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CIVIL WARS: STAYS OF EXECUTION, APPELLATE SANCTIONS AND THE NATURE OF CONSENSUS ON THE UTILITY OF APPELLATE REVIEW*

Larry Catá Backer**

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ABSTRACT

Civil appeals involve a balancing of the costs of appealing a determination of a lower court against the probability of reversal, modification, or affirmance at the appellate level. The rules of appellate procedure affect this calculation, and, in that manner, affect the substantive outcomes of litigation in a number of respects. This article examines two variables in the calculus of appeal: suspensions of the effectiveness of judgments pending appeal and sanctions for frivolous appeals. Appeals postpone the finality of a lower court determination; suspensions of judgments postpone the effectiveness of judgments. Each can be used to heighten the judgment-deadening effect of the other. The recent amendments to the civil appellate rules in Oklahoma respecting suspensions of the effectiveness of judgments pending appeal and frivolous appeals provide a useful framework for exploring the ramifications of procedural changes on substantive outcomes and the distribution of the power of process between plaintiffs, defendants and the courts. This article explores these ramifications from three perspectives, each based on the underlying issues and

problems set forth in the Introduction and in Part I. *Supersedeas, Frivolousness and the Utility of Appeal.* Although related, the analysis of each perspective can stand alone.

1. PRACTICAL PERSPECTIVE. The first perspective, set forth at Part II., focuses on the practical ramifications of change to appellate procedure based on the 1993 changes to the Oklahoma civil appellate rules of supersedeas and frivolous appeals. It discusses in detail the nature and effect of suspensions of the effectiveness of judgements and sanctions for frivolous appeals on judgments and the process of determining whether to appeal (or resist and appeal of) a judgment under prior law and current law.

2. STRATEGIC AND THEORETICAL PERSPECTIVE. The second perspective, set forth at Part III, *Consensus, Complexity and House Bill 1468*, explores on a more theoretical level, the changes to civil appellate rules of supersedeas and sanction for frivolous appeal. It provides a stategic analysis of the direction and utility of changes to civil appellate practice rules from both a systemic and participatory view. It argues that these changes do little more than create complexity and ambiguity which result in an increasing sense of unfairness which may affect substantive determinations.

3. PARADIGMATIC PERSPECTIVE. The third perspective, set forth at Part IV, *Putting the Changes in Perspective*, examines the manner in which civil appellate rules are modified in the context of the critical assumptions underlying American notions of the adversarial process of dispute resolution. These assumptions add unpredictability and arbitrariness to the appellate process, and limit the choices available to further the process of appeal.

INTRODUCTION

On June 10, 1993, Oklahoma Governor David Walters signed House Bill 1468,[1] which made substantial changes to civil appellate practice in Oklahoma. These changes represent the second attempt in three years by the Oklahoma Legislature to substantially amend the state's rules of civil appellate practice. The first attempt, memorialized in the Oklahoma Judgments and Appeal Act (the "OJAA"),[2] aggressively overhauled state appellate practice. The overriding

1. H.R. 1468, 44th Leg., 1st Session, 1993 Okla. Sess. Law Serv. A-2.

2. OKLA. STAT. tit. 12, §§ 1001-1008 (Supp. 1990)(repealed 1991). This Act is discussed in Charles W. Adams & J. Michael Medina, *Recent Developments in Oklahoma Civil Appellate*

purpose of the OJAA was to bring order and regularity to the determination of finality of judgments, decrees and appealable orders of the lower courts.[3] To accomplish this task, the OJAA provided that judgments would become final and effective on the date of the filing of a written judgment with the court clerk and specified written form for judgments. It also changed state rules affecting the awarding of fees and costs on judgments, the timing of post-trial motions, the manner of commencing an appeal, the appealability of cases involving multiple claims, rules governing stays of execution of judgments, and the authority of courts to sanction frivolous appeals.[4] The OJAA was repealed in substantial respect six months after it went into effect.[5]

Repeal of the OJAA by the Legislature did not mean rejection of the notion that there was a need to reform civil appellate practice rules. At the time it repealed the OJAA, the Legislature also created the Joint Interim Committee and an Interim Advisory Committee on Judgments and Post-Judgment Procedure.[6] The result of the work of these committees, House Bill 1468, represents an attempt to carry out the original purposes of the OJAA and avoid the problems which led to the OJAA's repeal. House Bill 1468 attempts to clarify the time for filing appeals by tying finality and effectiveness to the filing of a written judgment executed by a judge.[7] It also specifies the time for the

Procedure, 26 TULSA L.J. 489 (1991). The legislative history of the OJAA is discussed in Lawrence Tawater, *The Proposed Appellate Procedures Act*, (OBA/CLE Seminar, October 26, 1990); Wallace, *The Legislative History of the New Act on Judgments and Appeals*, (OBA/CLE Seminar, October 26, 1990).

3. *See* OKLA. STAT. ANN. tit. 12, § 1001 (West Supp. 1990) (Committee Comments). Final judgments, orders and decrees of the trial court subject to appellate review are specified in OKLA. STAT. ANN. tit. 12, ch. 15, App. 2 Rule 1.10 (West 1988 & Supp. 1993) (Rules of Appellate Procedure in Civil Matters); appealable interlocutory orders are specified in OKLA. STAT. ANN. tit. 12, ch. 15, App. 2, Rule 1.60 (West 1988) (Rules of Appellate Procedure in Civil Matters).

4. For a brief discussion of these provisions see Adams & Medina, *supra* note 2, at 491-493; *see also* the committee comments to the OJAA, OKLA. STAT. ANN. tit. 12, § 1001 (West Supp. 1990) (Committee Comments).

5. Apparently, the Oklahoma Legislature concluded that repeal (not amendment) was the "better part of valor" in light of opposition to the OJAA expressed by members of the Oklahoma legal community. Opponents insisted that the prescribed forms of judgments would be difficult to work into their established manner of practice and that the new finality and effectiveness provisions were inappropriate in certain instances. *See* House Bill 1468, § 9, *adding* the Committee Comments to new OKLA. STAT. tit. 12, § 696.2 Committee Comments (Supp. 1993) (draft, on file with author).

6. S. Con. Res. 20, 43d Leg., 1991 Okla. Sess. Law Serv. A-2.

7. House Bill 1468, §§ 9-10, *adding* OKLA. STAT. tit. 12, §§ 696.2 and 696.3. For a discussion of these new rules, see Charles W. Adams, *Appellate Procedure: Amendments for the Oklahoma and Federal Courts*, 29 TULSA L.J. 31 (1993).

filing of post-judgment motions,[8] provides a savings provision for premature appeals,[9] clarifies the rules relating to the suspension of the effectiveness of judgments after the filing of judgment,[10] and expands the authority of the courts to sanction frivolous appeals.[11]

This article examines two House Bill 1468 changes: (a) suspensions of the effectiveness of judgments and (b) frivolous appeals. Suspensions or stays of judgments postpone the effectiveness of judgments; appeals, even frivolous appeals, postpone the finality of a lower court determination. Suspension of effectiveness and postponement of finality are inexorably tied together; each can be used to heighten the judgment-deadening effect of the other, or to preserve the status quo until errors below can be corrected. Both represent ways in which litigants and the courts distribute the costs of correcting erroneous determinations in a system where the litigants ideally control the scope and pace of the dispute and its resolution.[12] Like other "procedural" rules, these affect the ability of a litigant to protect successfully substantive rights either as plaintiff or defendant. In this sense, both serve as useful barometers of the way we perceive what is a fair process for the protection of the rights of litigants on average.

The rules respecting the availability of stays of execution and the power of the courts to punish the bringing of substantively weak appeals (however broadly or narrowly defined) as "frivolous," represent a consensus about the value of appellate review in the dispute resolution process. Stated another way, both evidence current consensus respecting the amount of deference which ought to be given to trial court determinations. The value of appellate review, in turn, is based on this initial determination. Underlying this consensus building is the goal of maximizing the probability that disputes are settled in a manner perceived by the litigants to be just and fair.[13] The stronger the

8. House Bill 1468, § 8, *amending* OKLA. STAT. ANN. tit. 12, § 653 (West 1988 & Supp. 1993); *id.* § 19, *adding* OKLA. STAT. ANN. tit. 12, § 990.2.

9. *Id.* § 18, *amending* OKLA. STAT. tit. 12, § 990A by adding § 990A(F).

10. *Id.* §§ 20-21, *adding* OKLA. STAT. tit. 12, §§ 990.3-990.4.

11. *Id.* § 24, *adding* OKLA. STAT. tit. 12, § 995.

12. For a discussion of the critical assumptions of the adversarial system, on which Oklahoma's system of civil appellate procedure is grounded, see LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE 705-708 (1949) (describing the elements of procedure which society believes strengthens the moral force of dispute resolution); Judith Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 845-70 (1984) (identifying twelve of what the author describes as "valued features" which underlie American approaches to civil procedure). *Cf.* John Thibaut & Lorens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978) (examining a theoretical basis for valuing the adversarial system).

13. *See* Resnick, *supra* note 12, at 845-70; Thibaut & Walker, *supra* note 12; (examining the theoretical basis of the value of the adversarial system); Laurens Walker et al., *The Relation*

perception that trial court decisions are consistently fair, the more likely appellate review will be restricted and the more likely that suspensions of judgments will be difficult to obtain and appeals will be likely characterized (and sanctioned) as frivolous. The converse also applies: where trial courts on average are perceived to be incompetent, appeals will be encouraged, suspensions of judgments' effectiveness will be easier to obtain, and the sanctioning of almost any appeal will be difficult.[14] The modifications brought by House Bill 1468 represent a change in the consensus respecting deference to be given lower court determinations. This change has effectively modified the optimum allocation of cost and risk among the parties, altering the relative weighing between the desire to foster the collection of judgments and the desire to correct erroneous judgments. Likewise, the modifications evidence the continuing trend toward the fragmentation of ostensibly uniform rules,[15] and the increasing resort to discretion in the application of the rules.[16]

Part I provides the contextual background from which the article considers the problems of appellate procedure. Part II examines the practical ramifications of the distribution of the costs and benefits of suspending the effectiveness of judgments and interposing frivolous appeals under prior law and the effect of the House Bill 1468 on both.

Between Procedural And Distributive Justice, 65 VA. L. REV. 1401, 1415-20 (1979). Obviously, other factors enter into the calculus " for instance, the cost of the dispute resolution system, the willingness of society to bear those costs, the value of the object of the disputes to be resolved, and the identity of the disputants. These considerations lie outside the scope of this article.

14. Professor Dalton has spoken of the effect of easier appeal on the reputation of the trial courts. He has argued that as appeals are more accepted or viewed as more necessary, the value of trial court decisions, and the deference given those decisions at the appellate level shrinks. *See* Harlon Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 92 (1985).

15. On the notion of the trans-substantive nature of procedural rules, especially of the Federal Rules of Civil Procedure, see Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733 (1988); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067-87 (1989). For a criticism of the idea of trans-substantivity in the Federal Rules of Civil Procedure, see, for example, Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473-76 (1987)(book review). For a discussion of the advent of local rules of procedure and its effect on the goal of uniformity, especially of the Federal Rules of Civil Procedure, see Robert E. Keeton, *The Function of Local Rules and the Tension With Uniformity*, 50 U. PITT. L. REV. 853 (1989); A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991).

16. For a critical examination of the shift toward discretionary judicial decision-making in the context of settlement, see Richard L. Marcus, *Apocalypse Now*, 85 MICH. L. REV. 1267 (1987) (reviewing PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986)). For criticisms of the modern judge as discretionary decision-maker, see JOEL HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1986).

House Bill 1468 represents a shift of consensus in favor of deference to the determinations of lower courts by making appeal more costly to litigants. Part III examines the House Bill 1468 changes as a reflection of the ongoing process of refining the general consensus respecting the utility of the civil appellate process. House Bill 1468 evidences less of a shift in the fundamental consensus respecting the utility of appellate review, than the growth of a more fractured view of this utility. Suspending judgments has increasingly become a function of causes of action. The added powers of the appellate courts to sanction frivolousness evidence the importance of the appellate courts as managers of their own dockets. The discretionary power to sanction cases brought for review carries with it the power to burden (and thus limit) parties considering appeal. The price litigants pay for the new consensus is complexity and ambiguity, and both are unavoidable by-products of the critical assumptions shaping our adversarial system of dispute resolution. In this case the "by-product" produces its own danger to the integrity of the adversarial system—for complexity and ambiguity produce unpredictability. From an awareness of unpredictability in the implementation of procedural rules may come an increasing uneasiness about the very fairness of the process the new consensus was attempting to enhance.[17] Part IV explores the sources which drive Oklahoma's persistent search for the refinement of its civil appellate procedure. The unpredictability which increasingly emerges from the indulgence in complexity and ambiguity in our procedural rules and which threaten to undermine the fundamental notions of fairness which animate them are an inevitable by-product of the critical assumptions which both define and limit the American version of the adversary system of dispute resolution.

I. SUPERSEDEAS, FRIVOLOUSNESS AND THE UTILITY OF APPEAL

Let's put the discussion which follows in context and set the stage

17. Indeed, the nomadic search for oases of consensus on the utility of appellate review and the enforcement of such consensus obliquely through procedural rules such as that of sanction and effectiveness may well act perversely to create the opposite of that which was sought.

> At a time when the ideal of egalitarianism rides as high, as it does today, it is supremely ironical that we should at the same time be embracing discretion and rejecting principles; for this process must of necessity encourage and legitimize a greater inequality of treatment in the judicial process.

P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1271 (1980). *See, e.g.,* Carl Tobias, *Public Law Litigation, Public Interest Litigants and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989); Georgene Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988).

for Parts III and IV. The trial (perhaps lengthy and complex, perhaps short and simple) is over.[18] Neither litigant chose to settle at any stage prior to judgment, each believing the risk of loss was less than the cost of settlement.[19] Well, the court (or the jury) has now brought substantial certainty to the risk of winning (or losing) the litigation. What next? If the plaintiff was the judgment winner, he will want to collect his judgment. He, therefore, has an incentive to seek execution of the judgment as quickly as possible.[20] To wait for execution of

18. I employ the example of a judgment or decree after trial for purposes of illumination. Similar considerations or pressures exist in the context of appealable interlocutory orders.

19. For an interesting study of the patterns of settlement, see David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 89 (1983) (studying cases in five federal district courts and one state court in each district, finding that less than 8% of the cases went to trial; the others were either settled or dismissed at the pleading or summary judgment stage). *See also* Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986) (dicussing positive value of judicial settlement, especially of complex cases); *but see* Marcus, *supra* note 16, at 5. An argument has been made that the settlement of disputes should be discouraged in the context of the adversary process because it reflects the notion that the speedy resolution of disputes is to be preferred to their just resolution, the result being that justice suffers, and the risk of having to live with erroneous results increases, as settlements are encouraged. *See* Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1075-78, 1082-85 (1984).

20. As a technical matter, "execution" is the name of the writ permitting the seizure of property and the process of its issuance and delivery to the sheriff. "Levy" of the execution is what the sheriff does when he seizes property pursuant to the authority of the writ of execution. The process of execution to satisfy a judgment is highly technical, can be quite tricky, and lies beyond the scope of this paper. In very general terms, the following provides a short synopsis of the process: Executions are deemed a process of the court in Oklahoma, issued by the court clerk and directed to the county sheriff. OKLA. STAT. ANN. tit. 12, § 731 (West 1988). The general form of execution is a pre-printed two page form which can be obtained from the court clerk and which directs the sheriff to search for and seize enough property of the judgment debtor to satisfy the amount of the judgment. *Id.* § 736. For a discussion of the difference between writs of attachment and execution in Oklahoma, see Mount v. Trammel, 175 P. 232 (Okla. 1918) (noting writs of attachment permit seizure, writs of execution generally permit enforcement of judgments by sheriff's sale). Generally, upon the refusal of a judgment debtor to pay a judgment, all of his "[l]ands, tenements, goods and chattels, not exempt by law shall be subject to the payment of debts, and shall be liable to be taken on execution and sold." *Id.* § 733. Oklahoma provides broad exemptions from execution, at least for personal property. *See id.* at tit. 31, §§ 1 *et seq.* (West 1988 & Supp. 1993). The sheriff is required to return the completed writ on which he is to describe the property levied within sixty days from its issuance. *Id.* at tit. 12, § 802 (West 1988). Levy, first, is to be made on personal property (goods and chattels), and if none are found, on interests in real property. *Id.* § 751. It has been the practice, however, for sheriffs to refrain from seizing items of personal or real property unless the writ of execution lists specific property to be seized. Where no such listing appears, the sheriff will ordinarily hold the writ for a week and then return it to the judgment creditor with the notation "[n]o property found." *See* Steven L. Barghols, *Judgment Enforcement Against Real and Personal Property: Practical Considerations*, 61 OKLA. B.J. 3402, 3404 (1990). Writs of execution with no listing of property are usually issued in order to preserve the judgment from dormancy under OKLA. STAT. ANN. tit. 12, §§ 735, 801 (West 1988 & Supp. 1993). Sales of personal property seized in execution may be made no less than ten days after notice to all persons with an interest in the property. OKLA. STAT. ANN. tit. 12, § 751 (West 1988 & Supp. 1993). Written notice of the sale of real property must be given the judgment debtor at least ten days prior to the sale; public notice must be given for two consecutive weeks prior to sale. *Id.* § 764. For more detailed discussions of execution in Oklahoma, see Mac D. Finlayson, *Getting Your Money—Possessory*

judgment, especially if the litigation involved close questions of law or evidence, increases the chance that he will never collect the judgment. Indeed, the longer he has to wait for his judgment, the greater the cost to him,[21] and the more likely he will be to settle the judgment for something less than the entire amount awarded or relief accorded.[22] Even if he can collect his judgment quickly, the recovery may prove ephemeral if the judgment creditor is able to overturn the judgment after obtaining review. The mere possibility of review (at the trial or appellate level) diminishes the real effectiveness of his judgment; finality, thus, influences the value of effectiveness of judgments.[23]

The defendant, on the other hand, will have an incentive to avoid paying (or performing) the judgment. Assuming the defendant is not judgment-proof,[24] he will be strongly inclined to do two things: (1) get the tribunal rendering judgment to reconsider its decision or get another tribunal to overturn the original judgment and (2) put off the time before he will actually have to pay the judgment (certainly until all appeals have been exhausted). Even if it is unlikely that either the original tribunal or an appellate tribunal will seriously reconsider the original determination (i.e. there was a substantial probability that it was correctly decided under law that is firmly established), the defendant will still have an incentive to seek appellate redetermination, if and to the extent that pending such redetermination he can delay execution of the judgment.

The size of the incentive depends on the balancing of the benefits of delay against the costs of appeal. The cost of appeal is a function of the strengths of the anticipated arguments to be made on appeal (the significance of the errors of the trial court), the size of the judgment,

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Actions, *in* COLLECTING JUDGMENTS IN OKLAHOMA 177, 1192-205 (1992) (Paper presented on September 11, 1992, in Oklahoma City, Oklahoma); Barghols, *supra*.

21. The cost is greater even if one includes the payment of interest on the judgment to which the judgment winner may be entitled. The cost of delay, in terms of lost opportunities may well exceed the legal compensation therefor.

22. On the dynamics of this process, see Fiss, *supra* note 19, at 1076-77. Professor Fiss discusses these dynamics in the context of an extreme case, that of a dispute between a very well off litigant and an indigent litigant. However, the economic dynamics of the situation described, and its coercive effects, are equally applicable in every dispute involving litigants who do not possess unlimited resources.

23. However, the pressure in this instance bears more heavily on the judgment loser who, while exerting pressure in the form of the potential for reversal on review, still bears the substantial burden during the review period—the judgment loser had to pay the judgment, and hopes to get it back (less the value of the opportunity cost of the deprivation of the assets paid in judgment during the period prior to repayment).

24. A judgment-proof defendant should be indifferent to a judgment since, by definition, such a defendant is unable to pay the judgment, whatever its size. Where the award is for something other than money, most defendants are not "judgment-proof."

the direct attorneys fees and costs the judgment loser will incur to pursue the appeal, the cost of staying or suspending the judgment, and the extent (or possibility) of bearing additional costs in the form of sanctions. The more expensive the appellate process, the less likely a judgment loser will be to seek reconsideration or appeal (absent a high countervailing cost of not seeking appeal, and subject to the likelihood of victory).

Thus, increasing the cost of any factor, such as the "cost" of potential sanctions (by broadening the power of a court to sanction certain appeals or by more expansively defining the types of appeals subject to sanction), or increasing the difficulty (and therefore the cost) of suspending the effectiveness of the judgment (for instance, by eliminating suspensions as of right in favor of purely discretionary stays), creates real, and potentially significant incentives to abandon the process of post-judgment review. On the other hand, if the cost of delay to the plaintiff (in terms of risk of reversal, cost of delay of collecting his judgment, and cost of defending the judgment) outweighs the cost to the defendant of pursuing post-judgment review,[25] the plaintiff will have a strong incentive to settle, if only to maximize the real value of the judgment. Thus, underlying all of these considerations is the notion that the longer the defendant can delay execution, the more likely he will be able to effect a settlement of judgment, on terms more advantageous to him (reducing, thereby, the actual total cost of the litigation to him). The harder or more costly it is for a defendant to attack a judgment and seek review, the more deference is accorded the original disposition of the dispute and the closer the value of the judgment comes to the amount awarded; but it is also easier to preserve erroneous decisions from attack (thereby increasing the risk that a greater amount of bad law or bad judging will be perpetuated). The converse is also true: easy or less costly review diminishes the deference given lower court determinations and makes it easier to overturn erroneous decisions; but it also makes it easier to delay (diminish the value of) decisions which should not be overturned (and increases the risk that such decisions will be erroneously overturned). Consider also that bad law at the trial level is less costly to perceptions of the fairness of dispute resolution in the aggregate than bad law at the appellate level. Bad trial court decisions affect the

25. The value of the judgment to the plaintiff may decrease significantly as the costs to him of post judgment review increase and the time between judgment and satisfaction thereof increases.

litigants; bad law at the appellate level affects the potential litigants to whom the bad decisions may be relevant. A similar situation results when the defendant is the "judgment winner."[26]

Perversely, then, both the possibility of easy review and its opposite—limited review—create significant possibilities for abuse. These possibilities are both obvious and well recognized.[27] The greater the likelihood every decision of the trial court can be appealed without risk, the greater the risk that a judgment winner will be robbed of his judgment (in whole or in part). The robbery will occur in one of two forms: either the delay caused by the filing of the appeal will substantially reduce the value or worth of the original judgment to the judgment winner (he needed the relief sooner rather than later) or an appellate court will substitute its own error (in reversing the judgment) for the correct result reached at the trial level.[28] Conversely,

26. Thus, judgment in favor of a defendant leaves the plaintiff with no judgment to collect, but with the power to threaten the finality of the judgment in defendant's favor by filing post-trial motions or appeals, or both. To the extent the plaintiff takes any of those actions, he reduces the value of the defendant's victory by increasing the cost of defense (at least by the legal fees and costs thereof) and the risk that the judgment will be overturned. At some point in the process, the costs may be significant enough to compel the defendant to settle (that is to pay something to the plaintiff) in order to preserve the finality of the "victory." The less likely the plaintiff will incur extraordinary costs for launching post-trial attacks on the judgment, the cheaper such a strategy will be to him, and the greater the incentive to pursue it. Increasing the cost of post-judgment attacks on finality, for example by requiring the posting of the anticipated costs of appeal or by creating the possibility that the appellant can be sanctioned for filing what the court will conclude to be a meritless post-judgment proceeding, creates a disincentive to pursue this option. The weaker the anticipated arguments on appeal, the smaller the relief sought, and the larger the attorneys fees, the less likely post-judgment action will be pursued.

27. *See, e.g.*, H. Richard Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 6 HOFSTRA L. REV. 729 (1978); J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, SW. L.J. 677 (1989). Indeed, litigation decisions that may be highly lucrative for lawyers may be extremely costly to the client, even when undertaken in the zealous defense of the interests of the client in the litigation. *See* Earl Johnson, *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567, 575-76 (1980-1981).

28. Indeed, not even the Oklahoma Supreme Court, in crafting its certiorari rules has permitted itself the indulgence that appellate decisions are always, or even substantially always, error-free. But in recognizing the potential for error on appeal, it has also determined that the volume of cases is potentially so great that litigants will have to live with the risk of erroneous appellate decisions except under fairly exceptional circumstances. *See Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court*, Rules 3.13 (granting certiorari only "when there are special and important reasons," some of which are listed in that rule) and 3.14(F) (requiring that certiorari petitions not reach merits of appeal); OKLA. STAT. ANN. tit. 12, ch.15, App. 3 (West 1988 & Supp. 1993); J. Michael Medina, *Pitfalls In Oklahoma Appellate Practice*, 57 OKLA. B.J. 741, 744 (1986) ("The fact that the Court of Appeals erred will, by itself, seldom convince the Supreme Court to grant certiorari."). Some commentators who advocate a significant cutback in the scope of appeal from trial court decisions have made this same argument. *See* Dalton, *supra* note 14, at 92 ("Where the name of the game is to avoid reversal by toeing the appellate court line, victory will bring juster justice only if the appellate court has drawn the line in the right place. . . ."); Resnick, *supra* note 12, at 866 (noting that in systems

the harder or more costly it is to obtain reconsideration of erroneous judgments,[29] the greater the likelihood that litigants with meritorious positions will be locked out and judgments which ought not be executed will be, since a greater number of erroneous judgments will remain unchallenged.[30] The abusive potential of stays of execution is similar. The easier it is to put off the actual effectiveness of a judgment without incurring additional expense, the greater the possibility that the judgment winner will be deprived of some or all of his judgment. The harder it is to suspend the effectiveness of judgments, the more likely that the judgment loser will have to bear the expense of a judgment that should not have been awarded in the first place.[31]

This manipulative potential inherent in regulating both frivolous appeals and the effectiveness of judgments pending review creates substantial difficulty for law makers seeking to minimize abuse of procedural rules (that is, for substantive advantage). Indeed, there does not appear to be a point at which the manipulative potential of appellate procedure can be appreciably minimized, at least respecting effectiveness and finality. Thus, in one sense, the issue of suspensions of judgments and the "costs" of appeal can be better understood as a function of risk allocation. Both the rules permitting suspension of the effectiveness of judgments (as well as those making such suspensions difficult or practically unlikely) and those determining the costliness of appeals (especially of marginal appeals, appeals the purpose of which is predominantly to delay finality of judgments) effectively allocate risks between judgment winners and judgment losers by regulating the cost of obtaining judgment effectiveness and finality.

On a more fundamental level, the real issue of effectiveness and finality revolves around the notion of the utility of appellate review

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that permit appellate review, the risk increases that the problems making bad lower court judging (incompetence, bias, irrationality) may only be moved to the appellate level).

29. I am referring to difficulty in terms of the procedural hurdles which must be overcome in order to obtain review, as well as the costs associated with such review. In this sense, the greater the possibility that the loser of an appeal will be deemed to have filed a meritless appeal, and that such a determination will increase the size of the payments which must ultimately be made by the judgment loser, the costlier (and harder, for a judgment loser) will be the process of appeal.

30. *See, e.g.*, Paul Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 431 (1987) ("The idea of law is that the individual judge is accountable for the principled exercise of power. Discretionary accountability may look to the skeptic very much like no accountability at all.").

31. His costs, therefore, will include, not only the costs of defense, and of appeal, but also the costs associated with the payment of a judgment that ultimately will have to be repaid to him. For people without a surfeit of cash available to fund such "needless" expense, such costs can be ruinous.

itself; the issues of frivolous appeals and suspensions of effectiveness of judgments are those of the degree of deference which ought to be due lower court determinations, writ small. The greater the general mistrust of lower court determinations, the more likely that appeals will be more freely (and cheaply) allowed;[32] rules will tend to punish the marginal appeal less often and less severely and provide for easier means of suspending effectiveness pending review. On the other hand, when lower court determinations are viewed as more uniformly fair and just, procedural rules will be skewed to favor greater deference to such determinations and, appeals will tend to be treated more like extraordinary matters. As such, a broader range of appeals will appear to "waste the courts' time" and, on that basis, result in the sanctioning of the appellant, and the appellant will have a heavier burden to show that he is entitled to the suspension of a judgment.

The relationship between rules regulating effectiveness and those regulating finality becomes clear. Because the driving force behind rules of effectiveness and finality is the extent of the deference given to trial court determinations, changes in the rules relating to effectiveness and finality should, on the average, follow a predictable course. Greater deference to lower court determinations result in more power to sanction a larger variety of appeals, and more difficulty in staying judgments pending appeals follow one from the other. From less deference to lower court determinations should follow a narrowing of the power of the court to sanction appeals and a broadening of the right to suspend a judgment pending review.[33] And note that consensus on utility of appeal need not be monolithic; consensus can vary with the

32. *Cf.* Dalton, *supra* note 14, at 92. However, a variety of other factors, some of which may have nothing to do with the disputes to be resolved themselves, may well enter into the calculus of the utility of appeal, including the perceived incompetence of lower court personnel, court congestions, the cost of maintaining a freely available review apparatus, the value of the disputes to be reviewed, and the identity of the likely litigants who would take advantage of the procedure if made available, and the availability of alternative dispute resolution. A consideration of these issues lies outside the scope of this article. *See, e.g.,* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 19-24 (1987); Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution 11 Movement*, 53 U. CHI. L. REV. 424, 429 (1986); Resnick, *supra* note 12, at 845-70; Thomas B. Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43 (1982); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat To the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

33. Likewise, changes in the rules regulating frivolous appeals and suspensions of judgments are good evidence of a changing view of the deference to be given trial court determinations—even in the absence of specific reference to this issue. The respect to be accorded lower court determinations, on the average, is implicit in the arguments made to regulate the cost of appellate review by the manipulation of the procedural rules thereof. *See* discussion at Part III, *Putting the Changes in Perspective.*

type of award sought, or the nature of the action or the identity of the court making the initial determination.[34]

Minimizing the abusive potential of the appellate process is, of course, implicit in the determination of the degree of deference owing to trial court determinations *on the average.* Where trial court determinations are not accorded much deference, the implication is that impediments to appeal permit abuse by those seeking to maintain erroneous judgments. It follows that greater risk is allocated to judgment winners since it is less likely than not that judgments will survive appellate review. The identification of the more significant abuse, and the method of its correction, therefore, follow from a consensus respecting the utility of review.

The rules of stays of execution and frivolous appeal, theoretically at least, evidence the momentary balance between the risks of making and enforcing erroneous decisions and the effects of the abuse of the rules allocating such risks.[35] They are both a manifestation and implementation of the consensus respecting the utility of appeal; they are modified as the consensus on the utility of appellate review changes. The rules governing the suspension of the effectiveness of judgments and the "penalties" for frivolous appeals in effect before the changes brought by House Bill 1468 represented the prior consensus; House Bill 1468 represents the current consensus. I consider the nature of the old and new consensus below. I save consideration of the ramifications of consensus for Parts III and IV.

II. THE STATUTORY FRAMEWORK

A. *The Changes to Suspensions of Effectiveness of Judgments*

"As a general rule in Oklahoma, although *finality* always is, the effectiveness of a judgment need not be, and most often is not, postponed by an appeal."[36] Civil judgments and final orders, thus, can be enforced immediately upon their rendering, even during the pendency

34. Professor Resnick has identified a number of possible views on utility of review which might exist simultaneously in any jurisdiction. Determinations of a magistrate may be easily reviewed *de novo*, while judgments of a district court may be accorded substantial deference, and determinations of an appellate tribunal maybe reviewed only selectively by certiorari. *See* Resnick, *supra* note 12, at 845-70. A careful reading of the changes effected by House Bill 1468 would indicate that the consensus in Oklahoma shifts depending on the basis of the cause of action to be determined, with money judgments easiest to review and divorce proceedings and its ancillary actions harder.

35. *Cf.,* Resnick, *supra* note 12, at 865-66, 867-69 (noting the costs and benefits to litigants of systems in which lower court decisions are reviewed through some sort of appellate process).

36. Wilks v. Wilks, 632 P.2d 759, 762 (Okla. 1981).

of an appeal. However, civil judgments can be suspended during the pendency of an appeal in accordance with the provision of a number of statutes. In addition, both the Oklahoma Supreme Court[37] and the trial courts[38] have the inherent power to suspend execution of judgment. Traditionally, a trial court's determination pending appeal may be suspended by one of four methods: (i) automatically; (ii) by supersedeas, (iii) by stay, or (iv) by payment of the judgment. Automatic stays refer to suspensions of judgments by operation of law, without the requirement of any action on the part of the party in whose favor suspension lies. Supersedeas denotes a suspension of the effectiveness of judgments or final orders pursuant to an undertaking as a matter of statutory right. Stays, on the other hand, refer to the suspension of the effectiveness of judgments or final orders by the discretionary act of a trial or appellate court.[39]

House Bill 1468 consolidated a number of the supersedeas and stay provisions of prior law in new sections 990.3, 990.4 and in amended sections 993, and 1006 of title 12. New Section 990.3 in part codifies prior case law and court rules respecting automatic stays of judgments, and in part significantly modifies prior practice.[40] The purpose of new section 990.4 is primarily to clarify and simplify prior law.

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37. Mapco, Inc. v. Means, 538 P.2d 593, 595 (Okla. 1975)

38. Howe v. Farmers' & Merchants' Bank, 8 P.2d 665, 667-68 (Okla. 1932); *In re* Epley, 64 P. 18 (Okla. 1905).

39. *See Wilks*, 632 P.2d at 763 n.12 (awarding attorney's fee in a divorce suit is not subject to automatic postponement nor suspended as a matter of right).

40. The Committee Comments to new § 990.3 reinforce the sense that the purpose of the law is clarification:

> Section 990.3 provides for the automatic stay of judgments, decrees and final orders for 10 days after their filing. Section 990.3(A) mandates an automatic stay of money judgments, codifying the rule set forth in Mapco, Inc. v. Means, 538 P.2d 593 (Okla. 1975). An automatic 10 day stay is provided by section 990.3(B) for other types of judgments, but the court has discretion to impose conditions on the stay as are appropriate. This is meant to permit the court to exercise its discretion as to the matters subject to Section 990.3(B) in the manner courts had exercised their discretion under 12 O.S. § 974.1 of the prior law, for the 10 day period specified in the section. Section 990.3(C) excepts a number of types of action from the automatic stay so that judgments, decrees, and final orders in those actions are immediately enforceable. The court, however, is empowered to impose any conditions necessary to protect the interests of the parties. This will permit the courts, *sua sponte* or at the request of a party, to stay or otherwise limit the effectiveness of judgments, decrees, and final orders covered in Section 990.4(C) in the exercise of its discretion. It understood that such discretion will be exercised in the manner traditionally recognized in Oklahoma under statutes such as 12 O.S. § 974.1 of prior law. For actions subject to Section 990.3(C), the trial court's authority to impose conditions on the effectiveness of judgments commences at the time the judgment is pronounced (and, therefore to that extent "final" and effective) even though such judgments are not then final for purposes of appeal (see new 12 O.S. § 696.2(D)). It is, therefore, intended that with respect to the cause of actions identified in Section 990.3(C), that the term judgment, decree or final order, as used in Section 990.3(C)

The new provision, though, contains some departures from prior practice.[41] Section 993 covers appealable interlocutory orders, and section 1006 (to be renumbered section 994) treats the stay of judgments where there is more than one claim for relief or multiple parties.[42]

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include any "issue . . . enforceable when pronounced by the court" as specified in the new 12 O.S. 696.2(D).

House Bill 1468, § 20, *codified as* OKLA. STAT. tit. 12, § 990.3 (Committee Comments) (manuscript, on file with the author).

41. The Committee Comments to new § 990.4 reinforce the sense that the purpose of the law is clarification:

> Section 990.4 provides for stays of judgments, decrees, and final orders that extend beyond the automatic 10 day stays of Section 990.3. A supersedeas bond is required for the stay of a money judgment. As under former law, the size of a supersedeas bond for a money judgment would be twice the amount of the judgment for a property bond, but only the amount of the judgment plus costs and interest on appeal for a surety bond. Section 990.4(C) excepts a number of types of action from the provisions allowing a stay upon the filing of an undertaking and the posting of a supersedeas bond, but the trial court is given discretion to stay enforcement in these cases. The last sentence of Section 990.4(C) authorizes either the trial or appellate court to restore or grant an injunction during of an appeal, after the court has dissolved or denied a temporary or permanent injunction. It is based on a similar provision in Fed.R.Civ.P.62(c). Section 990.4(D) provides the trial court with the discretionary authority to stay the enforcement of any judgment, decree or final order not otherwise covered in subsections (A), (B), or (C). This is meant to carry over into new law, the traditional powers of the court to order stays of effectiveness, which had been set forth under prior law at 12 O.S. § 974.1. The Committee notes that judgments, decrees, and final orders subject to new Section 990.4(D) include those issues which are enforceable when pronounced as provided under new 12 O.S. § 696.2(D), but which are not subject to the provisions of the new Section 990.4(C). These include (1) Probate proceedings, (2) special executions in foreclosure, (3) conservatorship or guardianship proceedings, (4) mental health actions, (5) quiet title actions, and (6) partition proceedings. Section 990.4 is not intended to modify or repeal the various special rules respecting stays or supersedeas applicable to particular causes of actions or proceedings under other statutory or constitutional provisions. Such special rules survive unmodified by this Section 990.4. The special stay provisions include (but are not limited to) those relating to auto license suspensions (47 O.S. § 6-211), corporation (Okla. Const., art. 9, §§ 20, 21, 52 O.S. § 133) and banking commission (6 O.S. § 207(C)) proceedings, unlawful detainer actions (12 O.S. § 1148.1(A), workers' compensation proceedings (12 O.S. § 696.2(E)) and the like.

House Bill 1468, § 21, *adding* OKLA. STAT. tit. 12, § 990.4 (Committee Comments) (manuscript, on file with the author).

42. The Committee Comments to the amendments to old title 12, section 1006, renumbered as section 994 provide that:

> The first part of Section 994(B) is Federal Rule of Civil Procedure 62(h). Although Section 994(A) permits a court to issue a final judgment as to fewer than all the claims in the action, the court may provide under Section 994(B) that the judgment is not enforceable. This may be desirable where a plaintiff and a defendant are asserting claims against each other. Even though the court might decide to order that the claim that was decided first should be appealed immediately, it might also decide that the first claim should not be enforced until the other claim has been adjudicated so that the award for one could be offset against the award for the other. *See* Fleming v. Baptist Convention, 742 P.2d 1087, 1099 (Okla. 1987) (ordering stay of execution on main claim until judgment was rendered on counterclaim). The language of Federal Rule 62(h) has been expanded to make it clear that the court can protect the interests of all parties to the action. *See* Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 13 n.13 (1980).

House Bill 1468, § 23, *amending* OKLA. STAT. ANN. tit. 12, § 1006 (West 1988 & Supp. 1993).

With respect to each of the four categories identified above—(i) automatically; (ii) by supersedeas, (iii) by stay, or (iv) by payment—I examine the scope of the right to suspend the effectiveness of judgments under prior law, and then explore the ways in which House Bill 1468 modified prior practice.

1. Automatic Stays

Under prior law a number of judgments, decrees and appealable orders were subject to automatic stays ranging from several days to the duration of the review process. House Bill 1468 narrowed the availability of automatic stays for a number of different types of actions in a number of ways.

a. Prior Law

Under prior law, automatic stays of the effectiveness of judgments were strictly limited. Prior to 1991, the most comprehensive provision for automatic stay was Oklahoma Civil Appeals Rule 1.13, which effectively provided for an automatic ten day stay of the effectiveness of a judgment or order.[43] The purpose of this automatic stay was to give a party time to file a new trial motion, secure approval of a supersedeas undertaking as of right as provided by statute or move for a stay pending appeal, without the need of filing a motion to suspend the effectiveness of the judgment at the time it was rendered.[44] No court action was necessary to stay a judgment subject to automatic stay—compliance with the requisites for automatic appeal (for instance, the filing of an appeal or motion for new trial)—was the only requisite.[45] After the end of the ten day period following the rendering of a judgment, or following a denial of a new trial motion, the

43. OKLA. CIV. APP. RULE 1.13 (West 1988) provided that:

> If the party taking an appeal does not file a motion for new trial but desires to suspend the effectiveness of the adverse decision pending appeal, such party shall file a supersedeas bond or motion to stay within 10 days after the decision sought to be reviewed is rendered. If a motion for new trial is filed, the time to file supersedeas or motion to stay will begin to run from the date the motion is disposed of. This time limit may be extended by the trial court for good cause shown. A motion to stay may be considered and ruled upon by the trial court after the petition in error has been filed in this court.

44. Mapco, Inc. v. Means, 538 P.2d 593, 595 (Okla. 1975) (concluding that "purpose of Rule 1.13 was to grant automatic stay of judgment, report or verdict during ten day period when motion for new trial may be filed, unless trial court enters order to the contrary"). A judgment is effective immediately upon its rendering, except as otherwise provided by case law, rule or statute. Wilks v. Wilks, 632 P.2d 759, 761-62 (Okla. 1981) (providing an exception for divorce decrees pending appeal). OKLA. CIV. APP. RULE 1.13 thus provides such an exception.

45. *See* General Motors Corp. v. Cook, 528 P.2d 1110, 1115 (Okla. 1974) ("No action by any court was necessary to stay the judgment. With the filing of the appeal, the judgment was stayed

judgment winner could again immediately seek execution of the judgment. Suspension of effectiveness thereafter depended on the availability of another ground for automatic stay, or compliance with the provisions permitting suspension of judgments as of right (by supersedeas),[46] or by stay.[47] Motions for new trial were especially favored under prior law - the effectiveness of a judgment was stayed automatically pending determination of the motion.[48] Under prior law, only new trial motions affected the timing of an appeal of the decision below; motions for judgment notwithstanding the verdict, and motions to vacate the judgment neither affected the time to appeal or the effectiveness of the judgment.[49] This system became somewhat confused after the enactment and subsequent repeal of the OJAA, creating problems for determining when the ten day automatic stay provision commenced,[50] and for determining whether the automatic

pending that determination."). Of course, a party might be required to seek court action to prevent the other party from seeking to execute judgment in violation of the automatic stay. Moreover, a party ignores an automatic stay in non-money judgment (usually injunctive relief or declaratory judgment) cases at its own peril, especially where the party's actions disturb the status quo that a stay is meant to preserve. Thus, in *General Motors*, the Court explained that acting on a judgment subject to automatic stay pending appeal is done at the peril of the judgment winner. *Id.* ("If they now find themselves in a position of suffering damage by a stay, it is because of their own acts. The municipality did not act to place them in such a position other than to appeal. This the city had every right to do. The stay was automatic and allowed by statute.").

46. OKLA. STAT. ANN. tit. 12, § 968.1 (West Supp. 1993), and see discussion below at notes 85-139 .

47. *Id.* § 974.1, and see discussion below at notes 156-185.

48. As a consequence, new trial motions were a substantially cheaper means of delaying the payment of a judgment than was the filing of an appeal. But new trial motions are not a cost free alternative because under Oklahoma law appeals following a denial of a new trial motion are limited to the issues raised in the new trial motion itself. OKLA. CIV. APP. R. 1.13; Mapco, Inc. v. Means, 538 P.2d 593, 595 (Okla. 1975) ("Also, motion for new trial stays execution of trial court's judgment until disposition of motion for new trial.").

49. Under OKLA. STAT. tit. 12, § 991 (1991), the time for appeal is extended only upon the filing of a new trial motion, and not for other post-trial motions, including motion for judgments notwithstanding the verdict, or motions to vacate judgments. Because it is sometimes difficult to distinguish motions for new trial from motions to vacate, automatic stays predicated on the filing of a motion for new trial resulted in a substantial amount of uncertainty. *See, e.g.,* Salyer v. National Trailer Co., 727 P.2d 1361, 1362 (Okla. 1986) (holding that motions to reconsider should be treated as motions to vacate); Horizons, Inc. v. KEO Leasing Co., 681 P.2d 757, 759 (Okla. 1984) (treating motion to vacate as a motion for new trial) and discussion in Adams & Medina, *supra* note 2, at 503-05.

50. The OJAA substituted a 10 day bright line rule for that of OKLA. STAT. tit. 12, § 991 (1991), providing that any post-trial motion, however denominated, filed within 10 days after the filing of a judgment would extend the time for appeal until the trial court ruled on the motion. OKLA. STAT. tit. 12, § 1004 (Supp. 1990) (repealed 1991). *See also* OKLA. CIV. APP. R. 1.12(c) (West Supp. 1993). Under OKLA. STAT. tit. 12, § 1007(B) (Supp. 1990) (repealed 1991) execution on judgments was automatically stayed while a post-trail motion (filed within 10 days of the filing of the judgment) was pending and for 10 days after its disposition. CIV. APP. RULE 1.13 was thereafter amended, before the OJAA was repealed, to conform to new (now repealed) § 1007, providing a uniform rule automatically staying the effectiveness of all judgments while

ten day stay applied to the period after the disposition of post-trial motions.[51]

While the Civil Appellate Rules, as well as case law, appeared to indicate a fairly clear intention to allow a ten day automatic stay in all cases, and a stay thereafter if such were provided by statute,[52] there were some exceptions to this general rule. The language of *National Collegiate Athletic Association v. Owens*,[53] indicates that any statutory interference with the power of the court to issue, or refuse to issue, injunctions would violate the state constitution's separation of powers by interfering impermissibly with the court's "inherent discretionary power to protect and preserve the respective rights of litigants in injunctive and co-related lawsuits" guaranteed by the state constitution.[54] Additionally, automatic stay of *pendente lite* arrangements for custody, alimony, and child and wife support payments was not permitted.[55] Application of the automatic stay rules to such determinations may violate public policy which vests the trial court with the

timely filed post-trial motions are being considered by the trial court, and for ten days thereafter. *See* OKLA. CIV. APP. R. 1.13(A) (West Supp. 1993). The repeal of the OJAA without the subsequent revision of the Civil appellate rules has caused some confusion. *See, e.g.*, discussion in 2 MUCHMORE & ELLIS, OKLAHOMA CIVIL PROCEDURE FORMS AND PRACTICE, § 1305, at 932.1 (1992), where the authors argue that the provisions of the rule should be interpreted by consulting analogous current statutes as surrogates for the repealed statutes referenced in the rule. *See also* Clyde A. Muchmore & Harvey D. Ellis, *The Intricacies of Post-Judgment Motion Practice*, 1 OKLAHOMA APPELLATE PRACTICE AND PROCEDURE: PRACTICE IN THE OKLAHOMA AND TENTH CIRCUIT APPELLATE SYSTEMS 31 (Spring 1993)(sponsored by Oklahoma Bar Association and the University of Oklahoma College of Law Continuing Legal Education Department).

51. Thus, some commentators have argued that although the intent of revised OKLA. CIV. APP. R. 1.13 (West Supp. 1993) was to have a uniform rule that the automatic stay should not expire until ten days after the post-trial motion was decided, there is no assurance that the court would make good on this original intent, especially after the repeal of the OJAA. "This is [particularly] true . . . since the court has given effect to other revisions of the statute after the repeal of the [OJAA] even where the court rules were inconsistent with the revised law. The safe practice for parties wanting a stay would be to assume the stay expires when the trial court rules on the post-judgment motion, and to therefore contemplate that ruling by seeking a further stay in advance." Clyde A. Muchmore & Harvey D. Ellis, *The Intricacies of Post-Judgment Motion Practice*, 1 OKLAHOMA APPELLATE PRACTICE AND PROCEDURE: PRACTICE IN THE OKLAHOMA AND TENTH CIRCUIT APPELLATE SYSTEMS 31 n.41 (Spring 1993)(sponsored by Oklahoma Bar Association and the University of Oklahoma College of Law Continuing Legal Education Department).

52. This seems to be the teaching of Mapco., Inc. v. Means, 538 P.2d 593 (Okla. 1975); *see* Muchmore & Ellis, *supra* note 51, at 31.

53. 555 P.2d 879 (Okla. 1976) (holding that the power to stay the injunction must, as a constitutional matter, rest with the sound discretion of the trial court when NCAA sought mandamus to prevent enforcement of temporary injunction).

54. *Id.* at 881; OKLA. CONST. art. IV, § 1 (West 1988).

55. *See, e.g.*, Jones v. Jones, 612 P.2d 266 (Okla. 1980) (stating trial court has authority to entertain wife's post-decree application for alimony and counsel fees after husband's appeal from divorce decree had been brought to Supreme Court); Blair v. District Court of Oklahoma County, 594 P.2d 367 (Okla. 1979) (noting trial court retained jurisdiction pending appeal of divorce to consider application for alimony *pendente lite*); Enyart v. Comfort, 591 P.2d 709

"power necessary to provide for the welfare of minor children. . . . The Legislature. . . did not intend that there should be a period of time in which the Trial Court could not act in the best interest of minor children."[56]

In addition, automatic stays of judgments in certain specialized proceedings are governed by statute. Thus, a judgment against "any county, municipality, or other political subdivision of this state is automatically stayed without execution of supersedeas bond until appeal has finally been determined."[57] This applies to actions for which supersedeas is available to suspend the effectiveness of judgments as of right,[58] as well as all other types of judgments and appealable orders.[59] The rationale for this exemption of local governmental units is said to be that Oklahoma statutes already provide an effective means of collecting judgments against local government.[60] As such, the risk that judgment creditors will not be paid is small, and the supersedeas requirement superfluous.[61] Judgments in favor of political subdivisions are not subject to the automatic stay provisions. In such cases, a stay will be available to the other litigants only on the basis of that generally available to all litigants.

However, the power to stay injunctive relief against local governmental units is not unlimited. Despite the broad language of section 974.1, courts, apparently, will not permit the automatic stay of prohibitory injunctions against political subdivisions of the state.[62] In such

(Okla. 1979) (noting trial court has power to consider motion to modify child custody based on changed conditions during the pendency of an appeal from the then current custody order); Cochran v. Rambo, 484 P.2d 500, 501 (Okla. 1971) (explaining that stay provisions of OKLA. STAT. tit. 12, § 1282 (West 1988 & Supp. 1993) does not divest the trial court of its right to temporarily provide and care for children during pendency of appeal of a divorce decree).

56. *Enyart*, 591 P.2d at 711.

57. OKLA. STAT. ANN. tit. 12, § 974.1 (West 1988 & Supp. 1993).

58. *Id.* § 968.1 (West Supp. 1993). For a discussion of § 968.1, see notes 91-99, below.

59. *Id.* § 974.1 (West 1988 & Supp. 1993); General Motors Corp. v. Cook, 528 P.2d 1110, 1112-13 (Okla. 1974) (granting a variance for erection of oversized sign; city granted stay of judgment pending appeal after appeal filed). For a discussion of § 974.1, see notes 106, 112, and 156, below.

60. *See* OKLA. CONST. art. 10, § 28; *see also* OKLA. STAT. ANN. tit. 62, § 365.5 *et seq.*

61. City of Duncan v. Sager, 466 P.2d 956, 958 (Okla. 1970) ("Our statutes provide most effective procedures for the collection of judgments against municipalities.").

62. Thus, in City of Del City v. Harris, 508 P.2d 264 (Okla. 1973), the Supreme Court refused to permit the stay of an injunction pending appeal, which enjoined Del City from enforcing its zoning ordinances on newly annexed property, the effect of which would have prevented the owner from conducting his business there. This is in accord with the general rule that prohibitory injunction may not be stayed, while mandatory injunctions may. *See, e.g.*, City of Indianapolis v. Producers Realty, Inc., 166 N.E. 2d 648, 650 (Ind. 1960). This is also in accord with the generally accepted rule in federal court. *See, e.g.*, SCFC ILC, Inc. v. VISA, USA, Inc., 936 F.2d 1096, 1098-1100 (10th Cir. 1991) (holding that preliminary injunctions that disturb the status quo, that are mandatory rather than prohibitory, or that afford the litigants substantially all the relief

cases, application for an order denying the stay ought to be made to the trial court; if the trial court denies the motion, application can be made to the Supreme Court for a writ prohibiting the stay.[63] On the other hand, mandatory injunctions are subject to the automatic stays provided under section 974.1.[64]

b. House Bill 1468 Changes

House Bill 1468 has replaced the automatic stay provisions of case law and the Oklahoma Civil Appellate rules with a more complex set of rules which base the right to an automatic stay on three broad classes of judgments which the new law creates. These rules are based on the general finality rules enacted by House Bill 1468 which provides that, with some significant exceptions, a judgment is neither final nor effective until a written judgment is filed with the clerk.[65]

The new automatic stay provisions distinguish money judgments from other classes of judgments. Such judgments are subject to an automatic ten day stay, commencing at the time the judgment is filed.[66] The stay granted thereby is unconditional and springs automatically upon the filing of the judgment. This unconditional automatic stay is limited to judgments, decrees and final orders. Interlocutory awards and provisional remedies, even if appealable, are not included, even if such relief is in the form of a money "judgment."[67]

Judgments other than money judgments, or judgments where relief is granted in addition to the payment of money, make up the next class of judgments for which a ten day stay is permitted. For this class

recoverable at the conclusion of trial are disfavored and require the movant to satisfy a heavy burden to support issuance).

63. General Motors Corp. v. Cook, 528 P.2d 1110, 1111 (Okla. 1974); City of Del City v. Harris, 508 P.2d 264, 265 (Okla. 1973).

64. *See, e.g., General Motors Corp.*, 528 P.2d at 1112-13. In *General Motors*, the Supreme Court refused to overturn the automatic stay of a judgment permitting General Motors to erect a sign prohibited by city ordinance. *Id.*

65. *See* House Bill 1468, §§ 9 and 21, *adding* OKLA. STAT. tit. 12, §§ 696.2(C), (D), and 990.4(C). Certain family law, real property and injunctive actions remain effective when announced, though, even in those cases, finality must await the filing of a written judgment with the court clerk. For a discussion of the new finality rules enacted by House Bill 1468, *See*, Charles W. Adams, *Appellate Procedure: Amendments for the Oklahoma and Federal Courts*, 29 TULSA L.J. 31 (1993).

66. House Bill 1468, § 20(A), *adding* OKLA. STAT. tit. 12, § 990.3(A) which provides that "[w]here only the payment of money is awarded, no execution or other proceeding shall be taken for the enforcement of the judgment, decree or final order until ten (10) days after the judgment, decree or final order is filed with the court clerk."

67. Such remedies may be stayed, if at all, only pursuant to House Bill 1468, § 21 *adding* OKLA. STAT. tit. 12, §§ 990.4(C) and (D), and *id.* § 22, *adding* OKLA. STAT. tit. 12, § 993.

of judgments, an automatic ten day stay of effectiveness is permitted, commencing at the time the judgment is filed.[68] However, the stay granted in these cases is not unconditional. The statute permits the court, in its discretion, to impose conditions on the parties "that are necessary for the protection of the property or interests that are the subject of the action," including distribution of part or all of the property involved, where the court requires the payment of a supersedeas[69]

This represents a change from prior law. Under prior law the ten day automatic stay following judgment was automatic and unconditional, irrespective of the nature of the relief accorded. New section 990.3(B), in effect, imports into the automatic stay period the obligation to impose conditions on a stay which are made as of course in granting discretionary stays under section 974.1.[70] With respect to these judgments, the temporary stay is mandatory, but during the mandatory stay period, the conditions which might have been imposed had the court exercised its discretionary authority to stay the judgment will also apply. The statute, though it does not require the imposition of particular conditions, limits the conditions which can be imposed to those "necessary" for the protection of property or interests subject to the litigation. The availability of conditional automatic stays under section 990.3(B) is limited to judgments, decrees and final orders.

Suspensions of judgments and orders are not available in all cases. New Section 990.3(C), for the first time, creates a class of judgments and orders for which an automatic stay is not available.[71] With respect to this class of judgments and orders, no automatic stay is permitted. However, the court, "in its discretion, may impose any conditions that are necessary to protect the interests of the parties in such actions."[72] This represents a codification and confirmation of the implications of prior case law with respect to matrimonial proceedings

68. House Bill 1468, § 20(A), *adding* OKLA. STAT. tit. 12, § 990.3(B).

69. *Id.* § 20(C), *adding* OKLA. STAT. tit. 12, § 990.3(B).

70. *See* discussion, below, at notes 106, 112, and 156.

71. These include relief accorded in actions for divorce, separate maintenance, annulment, post-decree matrimonial proceedings, paternity, custody, adoption, termination of parental rights, juvenile matters, probate proceedings, habeas corpus proceedings, special executions in foreclosure, conservatorship or guardianship proceedings, mental health, quiet title actions, and partition proceedings or actions involving temporary or permanent injunctions. House Bill 1468, § 20(C), *adding* OKLA. STAT. tit. 12, § 990.3(C).

72. *Id.* § 20(C), *adding* OKLA. STAT. tit. 12, § 990.3(C).

and the matters ancillary to such proceedings.[73] It represents expanded protection, however, for a number of other proceedings. The presumption in favor of an automatic stay, implicit in case law under the inherent power doctrine of *Mapco*[74] and in the rules of civil appellate procedure,[75] has been reversed. New section 990.3(C) presumes against stays of the proceedings therein set forth. To that extent, especially in real property and injunctive actions, *Mapco* is either overturned or narrowed.[76] Contrary to the intent of the old appellate procedure rules, the intent of new section 990.3(C) is precisely not to relieve parties of the necessity of filing motion to stay at time judgment is entered.[77] Indeed, the new consensus on stays now provides a tremendous incentive to do precisely what the *Mapco* court insisted a "more orderly administration of legal process" should prevent[78]—the necessity of plaguing the court with motions and petitions immediately at the time the judgment is rendered.

The codification of modified automatic stay rules presents some interesting possibilities. First, it may permit the court to act *sua sponte* to both impose conditions on the automatic stay of judgments other than money judgments under new section 990.3(B) and to permit the staying of those judgments otherwise exempted from the automatic stay rules under section 990.3(C). The effect may be to allow a greater number of stays in situations where, under prior law, stays would have been more difficult to obtain. Indeed, the requirement that the court impose conditions during the automatic stay period for judgments otherwise subject to discretionary stays, may well make it harder for judgment winners to argue that the discretionary stay should not be extended during the pendency of the appeal. Since conditions have already been imposed necessary for the protection of the property at issue during the ten day automatic stay period, it may well constitute

73. *See* discussion above at notes 55.

74. Mapco., Inc. v. Means, 538 P.2d 593 (Okla. 1975).

75. OKLA. STAT. ANN. tit. 12, ch. 15, App. 2 Rule 1.13 (West 1988 & Supp. 1993).

76. *Mapco*'s rule has been especially narrowed with respect to injunctions. *Mapco* specifically held that temporary injunctions were stayed automatically for ten days pending the filing of a motion for new trial or appeal, "unless trial court enters order to the contrary." *Mapco*, 538 P.2d at 595. However, a court is not prohibited from staying such judgments; the rule merely presumes against entitlement to a stay.

77. *Id.*

78. *Id.* at 595-596.

an abuse of discretion for a trial court to refuse to permit the continuation of the stay after the end of the ten day period.[79]

Moreover, the rules change the pace of post-trial practice in some material respect. Since judgments in the actions subject to section 990.3(B) may be stayed conditionally during the ten day period after judgment, litigants will have a substantial incentive to prepare, *in advance of the filing of judgment*, a motion or petition for the imposition of conditions for stay in cases subject to section 990.3(B).[80] Likewise, since courts are permitted to impose conditions with respect to judgments not subject to automatic stay under section 990.3(C), there will be strong incentives for litigants in the proceedings described in section 990.3(C) to prepare petitions to mitigate the effect of such judgments for submission immediately upon the rendition of judgment.

The most significant casualty of new section 990.3 is new trial motions. The new statute changes the approach to the suspension of post-trial motions by eliminating the automatic stay pending resolution of the new trial motion. For purposes of determining a right to suspend the effectiveness of a judgment pending resolution of the new trial motion, the new statute does not distinguish between suspensions resulting from the filing of a notice of appeal or from filing a new trial motion. In either case the power to suspend a judgment after filing the appeal or motion for new trial will depend on the availability of supersedeas as of right or discretionary stays.[81]

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79. The only basis, perhaps, for such a determination would be proof of changed circumstances which make it impossible to impose conditions which are sufficient to protect the property or interests at issue, or a showing that the court's initial assumptions were substantially incorrect in a material respect.

80. Litigants have such an incentive before either party knows the outcome of the litigation. Why? Because the earlier a judgment winner can suggest conditions to impose on the judgment loser to stay the effectiveness of the judgment, the more expensive such stays will be for the judgment loser, and the less likely such judgments may actually be stayed. In addition, the petition can lay the groundwork for a motion to deny the extension of the § 990.3(B) stay beyond the ten day as-of-right period.

81. House Bill 1468, § 21, *adding* OKLA. STAT. tit. 12, § 990.4(A)(1). This rule applies whether or not the post-trial motion tolls the timing of the period in which to file an appeal under new OKLA. STAT. tit 12, § 990.2. The rule of Mapco., Inc. v. Means, 538 P.2d 593, 595 (Okla. 1975) ("Also, motion for new trial stays execution of trial court's judgment until disposition of motion for new trial."), appears, in this respect, to be substantially modified. However, until the Supreme Court amends its civil appellate rules, the existing rules may still permit the *automatic* stay of the effectiveness of all judgments pending the disposition of any new trial motion, except, perhaps, the judgments in proceedings specified in new OKLA. STAT. tit. 12, § 990.4(C). Under OKLA. STAT. tit. 12, § 1007(B) (Supp. 1990) (repealed 1991), execution on judgments was automatically stayed while a post-trail motion (filed within 10 days of the filing of the judgment) was pending and for 10 days after its disposition. OKLA. CIV. APP. R. 1.13 was thereafter amended, before the OJAA was repealed, to conform to new (now repealed) § 1007, providing a uniform rule automatically staying the effectiveness of all judgments while timely filed post-trial motions are being considered by the trial court, and for ten days thereafter. *See*

In contrast, the changes to the supersedeas provisions were not meant to affect the automatic suspension of judgments against "any county, municipality, or other political subdivision of the State of Oklahoma," which was provided by prior law.[82] However, it is not clear whether the broad right to automatic suspension of judgments accorded political subdivisions of the state under prior law has not been substantially narrowed. New section 990.4(C) provides for a discretionary stay in a number of proceedings which are also not subject to an automatic ten (10) day stay after judgment under new section 990.3(C). Among the proceedings covered are injunctions and quiet title actions. In contrast to the provisions of prior law, neither section exempts from its application political subdivisions of the state.[83] As such, absent a very broad reading of section 990.4(F), political subdivisions may now be treated like other litigants with respect to the effectiveness of judgments rendered against them, at least in this respect. In any event, the new law does not overturn the case law prohibitions of automatic stays of prohibitory injunctions against cities.[84]

2. Supersedeas

House Bill 1469 does not materially alter litigants' options for stay after the end of the ten day period following the rendering of a judgment. Suspension of effectiveness thereafter depends on the availability of another grounds for automatic stay, or compliance with the provisions permitting suspension of judgments as of right (by supersedeas),[85] or by stay.[86] House Bill 1468 did, however, affect the availability of the right to supersedeas at the margin.

a. Prior Law

Supersedeas applies when an appellant has a statutory right to suspend the effectiveness of a judgment or final order. The right to

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OKLA. CIV. APP. R. 1.13(A) (West Supp. 1993). Courts, of course, retain their inherent power to suspend their judgments in their discretion. *Mapco*, 538 P.2d at 595-96.

82. House Bill 1468, § 9, *adding* OKLA. STAT. ANN. tit. 12, § 990.4(F), provides that "[t]he execution of a supersedeas bond shall not be a condition for granting of a stay of judgment, decree or final order of any judicial tribunal against any county, municipality, or other political subdivision of the State of Oklahoma."

83. Contrast OKLA. STAT. ANN. tit. 12, § 974.1 (West 1988 & Supp. 1993) ("except that execution of a judgment . . . against [any political subdivision of the state] is automatically stayed without execution of supersedeas").

84. City of Del City v. Harris, 508 P.2d 264 (Okla. 1973), and discussion, above, at notes 61-62.

85. House Bill 1468, § 21, *adding* OKLA. STAT. tit. 12, § 990.4(A).

86. *Id.* at tit. 12, § 974.1, and see discussion below at notes 156-183.

supersedeas is limited to judgments or final orders directing the payment of money,[87] the execution of a conveyance or other instrument,[88] the sale or delivery of possession of real property,[89] and the assignment or delivery of documents.[90] The right to suspend in these cases depends only on the appellants' ability to comply with the statutory conditions for asserting the right.

Generally, the power to suspend a judgment as-of-right is conditioned on the posting of a statutorily required undertaking, that is a promise to pay or otherwise comply with the terms of the judgment or order.[91] The undertaking is executed on the part of the plaintiff in error, with one or more sufficient sureties or guarantors of the undertaking made by the plaintiff.[92] The form of the undertaking and the sureties is not prescribed by statute.[93]

For money judgments, the plaintiff in error (the appealing party) is required to undertake payment of the condemnation money and costs, in the event the judgment or order is affirmed. The required undertaking executed by the plaintiff in error must include one or more "sufficient sureties," and must be for double the amount of the judgment or order. However, the statute also provides that where the undertaking is executed or guaranteed by a state licensed bonding company, the bond need be only in the amount of the judgment and costs, including costs on appeal.[94]

For judgments or final orders directing the execution of a conveyance or other instrument, the plaintiff in error is required to undertake to abide by the judgment, if affirmed on appeal, and pay the costs

87. *Id.* § 968.1(1).
88. *Id.* § 968.1(2).
89. *Id.* § 968.1(3).
90. *Id.* § 968.1(4).
91. *Id.* §§ 968.1, 969.1. For discussion of the requirements for a valid undertaking, see discussion at notes 121-139 below.
92. *Id.* § 968.1. Most Oklahoma case law on the extent of the liability of sureties is of ancient vintage. The liability of a surety on a supersedeas bond is contractual and is determined by provisions of the bond; liability, therefore, cannot exceed the terms thereof. Allen v. Hartford Accident & Indemnity Co., 123 P.2d 252 (Okla. 1942) (holding that surety not required to pay damages for delay caused by appeal where bond only provided for payment of "condemnation money and costs in case said judgment shall be affirmed"). As such, a surety is bound by all of the terms of the bond, including the recitals. *See* Richardson v. Penny, 61 P. 584, 585 (Okla. 1900) ("Having executed their solemn obligation to pay to the plaintiff . . . , and recited in this obligation that a suit was pending . . . , and that judgment was rendered against them, the law says they shall not be permitted to contradict such recital, but shall be bound thereby."). And, absent provisions to the contrary in the bond, the surety's liability is co-extensive with that of the principal. *Allen*, 23 P.2d at 252 (discussing liability to third parties).
93. Ryndak v. Seawell, 102 P. 125, 126 (Okla. 1909) (holding bond valid even though it contained technical errors and omissions).
94. OKLA. STAT. ANN. tit. 12, § 968.1(1) (West Supp. 1993). *See also* notes 126-129, below.

on appeal. The court has discretion to determine the amount of the bond accompanying the undertaking.[95] However, in lieu of the undertaking required, the party seeking the stay may, instead, deposit the executed conveyance or other instrument with the clerk of the court in which judgment was rendered, pending the determination of the appeal.[96]

For judgments directing the sale or delivery of possession of real property,[97] the petitioner in error is required to undertake that during the possession of such property by the plaintiff in error, he will not commit or cause to be committed any waste on the property. Furthermore, he will pay the value of the use of the property from the date of the undertaking until delivery of the property pursuant to the judgment. In addition, the petitioner in error is required to undertake to pay all costs. If the judgment is for the sale of mortgaged premises and the payment of a deficiency arising from the sale, the petitioner in error must also undertake the payment of such deficiency. The court has discretion to determine the amount of the bond accompanying the undertaking.[98]

For judgments and final orders directing the assignment or delivery of documents, the petitioner in error has two choices.[99] He may place the documents required to be assigned or delivered in the custody of the clerk of the court to await the determination on appeal. Alternatively, the petitioner in error may deliver an undertaking accompanied by a bond in an amount to be determined by the court.

Special rules apply with respect to the suspension of a variety of other judgments or orders. Thus, requirements for suspending the denial, cancellation, revocation, or suspension of a motor vehicle license are set forth in the Motor Vehicles Code.[100] Except in cases where the action is statutorily mandated,[101] orders suspending motor vehicle

95. *Id.* § 968.1(2).

96. OKLA. STAT. tit. 12, § 969.1 (1992). It is unclear, however, whether deposit of the executed conveyance or other instrument with the clerk of the court as permitted under § 969.1 also relieves the petitioner in error from the obligation to post a bond to cover the cost on appeal under OKLA. STAT. ANN. tit. 12, § 968.1(2) (West Supp. 1993). However, the court may require the payment of these costs as a matter of course even in such a case, and the adverse party may always seek additional protection by motion for enlargement. That appears to be the practice in Tulsa County, Oklahoma. Interview with Hon. John C. Reif, Oklahoma Court of Appeals, in Tulsa, Oklahoma (July 1, 1993).

97. OKLA. STAT. ANN. tit. 12, § 968.1(3) (West Supp. 1993).

98. But obviously, the amount of the bond will approximate the estimated cost or value of the undertaking in the particular case.

99. OKLA. STAT. ANN. tit 12, § 968.1(4) (West Supp. 1993).

100. *Id.* at tit. 47, § 6-211 (West 1988 & Supp. 1993).

101. *Id.* § 6-211(A).

licenses may be stayed, if at the time an appeal is filed, the petitioner executes and files an appeal bond with the clerk of the court.[102] A certified copy of the bond is to be served to the Department of Motor Vehicles along with the notice of hearing.[103] Once the certified copy of the bond is served, the Department of Motor Vehicles must restore the license suspended during the pendency of the appeal.[104] Appeals from the denial, cancellation, or revocation of motor vehicle licenses do not appear to be covered by the supersedeas-as-of-right rules of section 6-211(K), which speak only of an "order of suspension by the Department."[105] These, then, may be suspended only under the general discretionary authority of the court to suspend judgments and orders conferred by statute.[106]

Supersedeas is also available for appeals by a defendant (the tenant) from adverse decisions in forcible entry and unlawful detainer cases. Tenants are given three days after the date of judgment to post a supersedeas bond, "conditioned as required by law."[107] However, the bond does not act to stay continuing obligations to pay rent (or presumably other obligations under the lease). Such rent must continue to be paid pending appeal on a timely basis; the failure to make such payment is considered an abandonment of the appeal.[108]

Appeals from decisions establishing or refusing to establish conservancy districts require, apparently as a jurisdictional prerequisite, the giving of a supersedeas bond in a sum to be determined by the

102. *Id.* § 6-211(K). Section 6-211(K) provides that the bond be in an amount between two hundred and fifty and five hundred dollars, and along with the sureties presented, be approved by the district court clerk. In Tulsa County, Oklahoma, the bond posted is usually $250.00. Interview with Clyde Sumter, Court Clerk (Traffic Division), Tulsa County, Oklahoma, in Tulsa, Oklahoma (July 2, 1993). The petitioner must undertake to prosecute the appeal with due diligence, to abide by state laws in the operation of the motor vehicle during the pendency of the appeal, and to comply with the final judgment of the appellate tribunal. Failure to comply can result in forfeiture of the bond. OKLA. STAT. ANN. tit. 47, § 6-211(K) (West 1988 & Supp. 1993).

103. *Id.* § 6-211(K).

104. *Id.* § 6-211(L). If the petitioner loses on appeal, the period of suspension will begin to run at the time the license is surrendered. *Id.*

105. *Id.* § 6-211(K). In addition, appeals of the determination of the district court to the Supreme Court, as provided under section 6-211(M) of title 47 are not accompanied by a mandatory right to suspend the district court determination.

106. *Id.* at tit. 12, § 974.1 (West Supp. 1993). *See also* discussion below at notes 156-183.

107. *Id.* § 1148.10A (West 1988 & Supp. 1993). The reference to "conditioned as provided by law" may be to the requirements for undertakings and the provisions of sureties as required under section 968.1 of title 12. The court is permitted to extend the time for posting of the bond to ten days after the date of judgment. *Id.* § 1148.10A.

108. *Id.* § 1148.10A. Such rent is to be paid to the court clerk's office, together with poundage (a tax or commission based on a percentage of the amount of the rent). Where there is a dispute as to the amount of rent, the court is permitted to determine how much is to be paid and at what time intervals. *Id.*

Supreme Court.[109] However, such order establishing a district will not be stayed unless appeal therefrom is made by at least 51% of the landowners affected.[110] Orders refusing to establish conservancy districts under the Conservancy Act of Oklahoma,[111] are subject to appeal only upon the giving of a bond in a sum to be fixed by the Supreme Court.[112]

Supersedeas is mandatory in workers compensation cases appealable to the Supreme Court.[113] Approval of the amount of the undertaking and of the sureties is made by the Administrator of the Workers' Compensation Court.[114] The Supreme Court has held that the bonding requirement of the workers compensation statutes is a jurisdictional prerequisite for appeal to the Supreme Court.[115]

Supersedeas and appeals from determinations of the Corporation Commission are partly mandatory and partly discretionary. Suspensions as-of-right of determinations of the Corporation Commission extend only to orders made in the exercise of the Corporation Commission's regulatory powers over public utilities and carriers.[116]

109. *Id.* at tit. 82, § 508 (West 1988). The Oklahoma Conservation Commission is empowered to organize irrigation, flood control, reforestation, and/or soil erosion prevention districts by petition to the district court. *Id.* § 502. Upon approval by the court, such districts are established, the directors of such district to be the members of the Oklahoma Conservation Commission. *Id.* § 504.

110. *Id.* § 508.

111. *Id.* §§ 531-688.1 (West 1988 & Supp. 1993). *See* In re Conservancy District No. 5, Lincoln County, 471 P.2d 879 (Okla. 1970) (explaining the constitutionality of the Conservancy Act).

112. OKLA. STAT. ANN. tit. 82, § 545 (West 1988). Appeals from decisions establishing a district do not appear to contain a jurisdictional bonding requirement. Such orders, presumably, may be stayed pending appeal, in accordance with the discretionary power of the court to grant stays under section 974.1 of title 12. *Id.* at tit. 12, § 974.1 (West Supp. 1993). *See id.* at tit. 82, § 545 (West 1988) ("After an order is entered establishing the district, such order shall, unless appeal be taken within ninety (90) days, be deemed final and binding. . . .").

113. OKLA. STAT. ANN. tit. 85, § 3.6(B) (West 1988 & Supp. 1993). The only exception is for appeals by municipalities and other political subdivisions of the state. *Id.*

114. *Id.* § 1.3 (creating position of administrator); *id.* at § 3.6(B) (requiring the Administrator to approve the sureties and the undertaking for appeals from the decision of the Workers' Compensation Court).

115. *See id.* § 3.6(B); Elam v. Workers' Compensation Court, 659 P.2d 938 (Okla. 1983) (requiring written undertaking for appeal of decision of Workers' Compensation Court did not deny claimant constitutional right to appeal under either the state or federal constitution); Bledsoe v. Munsingwear Corp., 579 P.2d 835, 837 (Okla. 1978) (holding that respondent's cross petition failed to show filing of required undertaking, cross petition dismissed); construing OKLA. STAT. tit. 85, § 29 (1971) (repealed 1977).

116. OKLA. CONST. art. IX, §§ 20, 21 ("Upon the giving of notice of appeal from an order of the Corporation Commission, the Commission, if requested, shall suspend the effectiveness of the order complained of until the final disposition of the order appealed, and fix the amount of suspending or supersedeas bond"); *see* Southern Bell Tel. Co. v. State, 214 P.2d 715, 718 (Okla. 1949) (citing state constitution, Supreme Court permitted supersedeas after denial of same by the Corporation Commission).

The bond must be approved and filed with the Corporation Commission, or approved, on review, by the Supreme Court.[117] Determinations of the Corporation Commission in orders issued under the Oil and Gas Conservation Act,[118] may be stayed at the discretion of the Commission.[119] Orders of the Banking Board or the Bank Commissioner may be stayed in the discretion of the Supreme Court.[120]

As a condition of the effectiveness of any undertaking, both the execution of the undertaking and the sureties must be approved by the court in which the judgment was rendered or order made, or by the judge or clerk thereof.[121] The judgment winner may participate in the process by motion for enlargement, if he feels the amount of the bond is too low.[122] On occasion a judgment winner can use this power to substantially increase the cost to a judgment loser of staying execution.[123] On the affirmance of the trial court's judgment, the Supreme Court may enter summary judgment against the sureties on the bond.[124] A dismissal of the appeal acts like an affirmance, and as such

117. OKLA. CONST. art. IX, § 21.

118. OKLA. STAT. ANN. tit. 52, §§ 81-287.15 (West 1991 & Supp. 1993).

119. *Id.* § 113. Both the Corporation Commission and the Supreme Court are given discretionary authority to permit the suspension of the order of the Corporation Commission on the terms set by either body. *See id.*; Bray v. Cap Corp., 571 P.2d 1224, 1227 (Okla. 1977) (citing statute which states that the Corporation Commission has the power to stay effectiveness of an order in a "forced pooling" case pending appeal, but the Commission is not required to stay its order).

120. OKLA. STAT. ANN. tit. 6, § 207(C) (West 1988 & Supp. 1993). The party seeking the stay must meet a "cause shown" standard. *Id.* As such, stays in these cases are likely harder to obtain than in the case of discretionary stays of private disputes.

121. OKLA. STAT. ANN. tit. 12, § 971.1 (West Supp. 1993) ("Before an undertaking shall operate to stay execution of a judgment or order, the execution of the undertaking and the sufficiency of the sureties must be approved by the court in which the judgment was rendered or order made, or by the judge or clerk thereof. . . ."). In Tulsa County, Oklahoma, the court clerks are generally responsible for the approval of supersedeas bonds and undertakings guaranteed by a bonding company or when a cash deposit is made. Otherwise, the trial judge approves the bond and undertaking. Also the judge is expected to approve bonds posted in cases involving injunctions and receivers. The amount of the supersedeas is equal to the amount of the judgment plus costs plus attorneys' fees (if the judgment winner has requested they be included) and three years' interest at the current statutory rate. Interview with Charlene Voss, Court Clerk, Tulsa County, Okla., in Tulsa, Okla. (June 30, 1993).

122. That is the standard procedure in Tulsa County, Oklahoma. Interview with Hon. John C. Reif, Oklahoma Court of Appeals, in Tulsa, Okla. (July 1, 1993).

123. For a recent spectacular example of the effect of this power in an analogous context, *see* Grand River Dam v. Eaton, 803 P.2d 705 (Okla. 1990), discussed below at notes 194 and 210-214.

124. OKLA. STAT. tit. 12, § 971.1 (1991) ("[I]n the event that the judgment of the court to which such appeal is taken is against the appellant, judgment shall, at the same time it is entered against the appellant, be entered against the sureties on the said undertaking to stay execution, and execution, and execution shall issue thereon against said sureties the same as against their principal, the appellant, and no stay of such execution shall be permitted.").

warrants judgment on the supersedeas.[125]

The supersedeas undertaking is a statutory bond, the conditions and operation of which are set by statute.[126] The bond, a written instrument, may be given directly by the petitioner in error or by such sureties as he can supply. The sureties on the bond may be individuals and are not required to be in the business of guaranteeing bonds in judicial proceedings. Indeed, the use of individuals as sureties seems to have been the common method of bonding an appellate undertaking in Oklahoma in the early part of the twentieth century.[127] Today, the usual form of undertaking is by bond, "executed or guaranteed by a corporation incorporated under the laws of the United States or of any state authorized to do business in this State of Oklahoma and having power under the statutes of this state to execute and guarantee bonds and undertakings in judicial proceedings . . . ."[128] It generally may be purchased from a bonding company.[129]

125. *See* Turk Bros. v. Brewer, 11 P.2d 926, 927-928 (Okla. 1932) (dismissing appeal as frivolous on judgment on a promissory note); Jordan Furniture Co. v. Graham, 10 P.2d 394, 396 (Okla. 1932) (dismissing appeal as frivolous on a breach of employment contract); Jacobs v. National Bank of Commerce of Tulsa, 288 P. 953 (Okla. 1930) (dismissing defendant's appeal of a judgment on a loan for noncompliance with appellate briefing rules); Dymond Drilling Co. v. Morris, 198 P.93 (Okla. 1921) (dismissing appeal voluntarily for failure to file briefs within time required by Supreme Court rules); Atchison, Topeka & Santa Fe Railway Co. v. Frenton, 153 P. 1130 (Okla. 1916) (dismissing action for damages on death of appellee pending appeal and revivor not accepted).

126. *See* Allen v. Hartford Accident & Indemnity Co., 123 P.2d 252, 253 (Okla. 1942); National Surety Co. v. Craig, 220 P. 943 (Okla. 1924).

127. *See, e.g.,* National Surety Co. v. Craig, 220 P. 943, 944 (Okla. 1923) (noting individual sureties on second bond); Richardson v. Penny, 61 P. 584 (Okla. 1900) (noting each of three plaintiffs in error served as surety for the undertaking bond of the others). This practice is rare today, and court personnel may be unaware that supersedeas may be guaranteed by individual sureties or entities other than licensed bonding companies. Interview with Charlene Voss, Court Clerk, Tulsa County, Oklahoma, in Tulsa, Oklahoma (June 30, 1993). However, in Tulsa County, Oklahoma, judges continue to accept personal sureties as a matter of course. In such cases, the judge requires the petitioner prove that his net worth is about five times the amount of the judgment. Interview with Hon. John C. Reif, Oklahoma Court of Appeals, in Tulsa, Oklahoma (July 1, 1993).

128. OKLA. STAT. tit. 12, § 968.1(1) (West 1988 & Supp. 1993).

129. Currently, bonding companies in Tulsa County, Oklahoma, generally require 100% collateral as a condition of guaranteeing a supersedeas bond. The preferred collateral is an irrevocable letter of credit from a bank or other financial institution. Bonding companies will rarely accept a security interest in property as collateral (second mortgages on homes or business property) because of the difficulties and expenses encountered when the bonding company must look to the security for payment. The premium for supersedeas bonds in Tulsa, Oklahoma, is 1% of the value of the fully collateralized bond, but increases to 2% of the amount of the bond when security other than an irrevocable letter of credit is accepted as collateral. Generally, in Tulsa County, Oklahoma, the attorney for the party seeking to stay execution drafts the form of supersedeas bond, for execution by the bonding company. Upon payment to the bonding company, the instrument is executed and presented to the court clerk. Interview with Brad McCrory, executive of American Bonding Company, Tulsa, Oklahoma, a subsidiary of Robert C. Bates & Associates, in Tulsa, Oklahoma (July 2, 1993).

As a technical matter, supersedeas cases require no written application to the trial court.[130] However, if the judge or the clerk refuses to accept a tendered bond, the preferred practice in Oklahoma is to retender the supersedeas bond by written application. The purpose of this retender is to secure a judicial hearing and an order refusing the tender thereby creating a record upon which the aggrieved party may base an appeal.[131] Likewise, if the party for whose benefit the bond is given is dissatisfied with the bond, the proper practice is to seek modification of bond conditions or to seek a new bond by motion to the trial court.[132]

Failure to comply with the requirements of statutory supersedeas is sufficient cause to vacate the stay, but not to dismiss the appeal.[133] Not surprisingly, the failure to file a timely petition in error also voids the suspension of the judgment or order.[134] Vacation of stays on supersedeas bonds is usually effected by motion to the trial court for an order vacating or setting aside the supersedeas bond and permitting execution of the judgment. Unless the stay is vacated, a party cannot seek execution, even if the bond is facially defective.[135] Once the stay is vacated, of course, the judgment is immediately effective and may be executed.[136]

Orders relating to staying execution of judgments are reviewable by the Supreme Court on motion by the aggrieved party, whether or

130. *See* Howe v. Farmers' and Merchants' Bank, 8 P.2d 665, 668-669 (Okla. 1932) (stating approved undertaking may be filed without court order after filing of petition in error, appeal being undetermined and the judgment being unexecuted).

131. Hon. Marion P. Opala, *What Temporary Relief Can You Get Pending Appeal*, paper delivered at a Program entitled Oklahoma Civil Appellate Procedure, sponsored by the Oklahoma Bar Association, Department of Continuing Legal Education, 1982 *in* OKLAHOMA CIVIL APPELLATE PROCEDURE, at IV-52. Generally, the only bonds or supersedeas which are not approved are those which involve "non-standard" forms of security, such as bank certificates of deposit or other collateral. Bonding company guarantees are rarely disapproved. Interview with Hon. John C. Reif, Oklahoma Court of Appeals, in Tulsa, Oklahoma (July 1, 1993).

132. Kirk v. Leeman, 18 P.2d 1088 (Okla. 1933) (holding that aggrieved party successfully sought a new supersedeas bond).

133. *Id.* at 1089 (denying motion to dismiss appeal for failure to comply with conditions for new supersedeas bond).

134. OKLA. STAT. ANN. tit. 12, § 971.1 (West 1988 & Supp. 1993).

135. Venator v. Edwards, 259 P. 596, 599 (Okla. 1927) (holding proper procedure for judgment winner was to move to vacate facially defective supersedeas whose filing stayed execution of judgment rather than to file a writ of mandamus), *approved in* Kirk v. Leeman, 18 P.2d 1088, 1089 (Okla. 1933) (staying money judgment pending filing of supersedeas which was timely tendered and approved by the court, granting thereafter motion to file an amended or new supersedeas bond, vacating supersedeas upon the failure to comply with this motion); *In re* Epley, 64 P. 18, 22 (Okla. 1901). *See* CIV. APP. RULE 1.31 (a)(4); OKLA. STAT. ANN., tit. 12, ch. 15, App. 2, Rule 1.31 (a)(4) (West Supp. 1993).

136. *See* OKLA. STAT. ANN. tit. 12, §§ 731 *et seq.* (West 1988 & Supp. 1993).

not the trial court has considered the matter.[137] The Supreme Court's power, though, is limited to cases properly before it on appeal. Defective appeal divests the Supreme Court of all power over the supersedeas bond.[138] Moreover, the Supreme Court has indicated that, with respect to motions relating to supersedeas bonds, it will not as a general rule consider any issue that might have been considered by the district court in the first instance, even if it has the power to do so.[139]

b. *House Bill 1468 Changes*

The statutory right to suspend judgments under prior law has been substantially recodified in new section 990.4, but with some potentially interesting new twists. That section makes clear that stays of execution, to the extent permitted in the statute, may be obtained (i) while a post-trial motion is pending, (ii) during the time in which an appeal may be commenced, and (iii) while an appeal is pending.[140] It provides the basis for obtaining a stay as of right and a discretionary stay with respect to the judgments identified therein. It also carries over the provisions of prior law section 971.1 regarding the requirement of court approval of the sufficiency of the undertaking and the

137. *See* Mapco, Inc. v. Means, 538 P.2d 593, 595 (Okla. 1975) ("This Court has statutory authority, as well as inherent power, to grant supersedeas or stay of execution in all cases pending before it wherein the particular statutes are silent on the subject."); Kirk v. Leeman, 18 P.2d 1088 (Okla. 1933); Grant v. Harris, 22 P.2d 56 (Okla. 1933); *see* Hon. Marion P. Opala, *What Temporary Relief Can You Get Pending Appeal*, paper delivered at a Program entitled Oklahoma Civil Appellate Procedure, sponsored by the Oklahoma Bar Association, Department of Continuing Legal Education, 1982 *in* OKLAHOMA CIVIL APPELLATE PROCEDURE, at IV-52. As a general matter care must be exercised in preserving the record on appeal. *E.g.*, Robert L. Wheeler, Inc. v. Scott, 818 P.2d 475 (Okla. 1991) (refusing to review pretrial conference order in garnishment proceeding overruling motion to stay execution of judgment because it was not part of record).

138. MidWest Life Ass'n v. Rivers, 16 P.2d 561 (Okla. 1933) (holding that where Supreme Court did not acquire jurisdiction by attempted appeal, it had no jurisdiction to render judgment on supersedeas bond).

139. Mapco., Inc. v. Means, 538 P.2d 593, 595 (Okla. 1975) ("However, trial court is certainly more familiar with factual circumstances of case[,] and we prefer it rule upon merits of Mapco's motion in the first instance."). *See* OKLA. STAT. ANN. tit. 12, ch. 15, App. 2, Rule 1.31(a)(4) (West Supp. 1993) (noting trial court retains jurisdiction pending appeal to decide motions in regard to staying the enforcement of judgments or of interlocutory orders appealable by right). The Supreme Court does periodically act without the benefit of a determination by a trial court. *E.g.*, Kirk v. Leeman, 18 P.2d 1088, 1089 (Okla. 1933) (vacating supersedeas entered by trial court rather than remanding). In light of *Mapco*, however, the better practice today might be to seek first by motion in the trial court the vacation of the supersedeas and, thereafter seek review by the Supreme Court in the event the trial court denies the motion. *See also* Hon. Marion P. Opala, *What Temporary Relief Can You Get Pending Appeal*, paper delivered at a Program entitled Oklahoma Civil Appellate Procedure, sponsored by the Oklahoma Bar Association, Department of Continuing Legal Education, 1982 *in* OKLAHOMA CIVIL APPELLATE PROCEDURE, at IV-52.

140. House Bill 1468, § 21, *adding* OKLA. STAT. tit. 12, § 990.4(A).

time during which suspensions are effective.[141] The form of the undertaking, and the sureties required for a supersedeas bond also remain unchanged.

Under Section 990.4, supersedeas as of right remains available when the judgments or final orders direct the payment of money,[142] the execution of a conveyance or other instrument,[143] the sale or delivery of possession of real property,[144] or the assignment or delivery of documents.[145] No other judgment or final order is subject to suspension by undertaking as of right. The new statute does provide litigants seeking to suspend a money judgment a new alternative—in lieu of a supersedeas bond, the judgment loser can deposit cash, U.S. Treasury Notes or Oklahoma State bonds with the court clerk in the amount of the judgment plus costs and interest on appeal.[146]

The new statutes leave substantially untouched the special rules regarding suspension of judgments under prior law. Thus, requirements for suspending the denial, cancellation, revocation, or suspension of a motor vehicle license are set forth in the Motor Vehicles Code.[147] The rules respecting the extent and nature of suspensions as of right from adverse decisions in forcible entry and unlawful detainer cases have not been modified.[148] Appeals from decisions establishing or refusing to establish conservancy districts continue to require, as a jurisdictional prerequisite, the giving of a supersedeas bond in a sum to be determined by the Supreme Court.[149] Orders refusing to establish conservancy districts under the Conservancy Act of Oklahoma,

141. *Id.*

142. *Id.* § 21, *adding* OKLA. STAT. tit. 12, § 990.4(B)(1), corresponding to OKLA. STAT. ANN. tit. 12, § 968.1(1) (West 1988 & Supp. 1993).

143. *Id.* § 21, *adding* OKLA. STAT. tit. 12, § 990.4(B)(2), corresponding to OKLA. STAT. tit. 12, § 968.1(2) (1992). Additionally, new section 990.4(B)(2) incorporates old OKLA. STAT. ANN. tit. 12, § 969.1 (West 1988 & Supp. 1993), allowing the appellant, in lieu of filing a bond, to execute the conveyance and deposit it with the clerk of the court during the pendency of the appeal.

144. *Id.* § 21, *adding* OKLA. STAT. tit. 12, § 990.4(B)(3), corresponding to OKLA. STAT. ANN. tit. 12, § 968.1(3) (West 1988 & Supp. 1993).

145. *Id.* § 21, *adding* OKLA. STAT. tit. 12, § 990.4(B)(4), corresponding to OKLA. STAT. ANN. tit. 12, § 968.1(4) (West 1988 & Supp. 1993).

146. House Bill 1468, *adding* § 21, OKLA. STAT. tit. 12, § 990.4(B)(1)(b). This option presents new opportunities and frustrations for litigants attempting to suspend the effectiveness of a judgment and simultaneously discharge a judgment lien.

147. OKLA. STAT. ANN. tit. 47, § 6-211 (West 1988 & Supp. 1993) and discussion above at notes 100-106.

148. *Id.* at tit. 12, § 1148.10A (West 1988 & Supp. 1993) and discussion above at notes 107-108.

149. *Id.* at tit. 82, § 508 (West 1988). The Oklahoma Conservation Commission is empowered to organize irrigation, flood control, reforestation, and/or soil erosion prevention districts

are still subject to special rules.[150] Supersedeas is mandatory in workers' compensation cases in cases appealable to the Supreme Court.[151] The new legislation specifically exempts workers' compensation cases from the new judgment filing provisions.[152] Supersedeas and appeals from determinations of the Corporation Commission continue to be governed by provisions of the Oklahoma Constitution[153] and statutory law.[154] Suspension of the effectiveness of orders of the Banking Board or the Bank Commissioner lies within the discretion of the Supreme Court.[155] Arguments that the general suspension of judgment provisions of new section 990.4 have implicitly repealed or modified these specific statutes should not carry much weight; there is no evidence that the Legislature intended to repeal any of the specific provisions by implication, and it certainly was not the conscious intent of the Interim Advisory Committee on Judgments and Post-Judgment Procedure.

3. Stays

House Bill 1468 has resulted in a broadening of the discretionary power of courts to grant (or deny) requests for stays of effectiveness of judgments. To that extent, that is, to the extent that the need to seek permission to stay effectiveness (rather than to comply with requirements which might secure a suspension of effectiveness automatically or by right) increases the uncertainty of suspending effectiveness, the greater the possibility for deference to lower court

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by petition to the district court. *Id.* § 502. Upon approval by the court, such districts are established, the directors of such district to be the members of the Oklahoma Conservation Commission. *Id.* § 504.

150. *Id.* §§ 531-688.1 (West 1988 & Supp. 1993); *see In re* Conservancy District No. 5, Lincoln County, 471 P.2d 879 (Okla. 1970) (constitutionality of the Conservancy Act).

151. OKLA. STAT. ANN. tit. 85, § 3.6(B) (West 1988 & Supp. 1993). The only exception is for appeals by municipalities and other political subdivisions of the state. *Id.*

152. House Bill 1468, § 9, *adding* OKLA. STAT. tit. 12, § 696.2(E).

153. OKLA. CONST. art. 9, §§ 20, 21 (West 1988 & Supp. 1993) ("Upon the giving of notice of appeal from an order of the Corporation Commission, the Commission, if requested, shall suspend the effectiveness of the order complained of until the final disposition of the order appealed, and fix the amount of suspending or supersedeas.").

154. OKLA. STAT. tit. 52, § 133 (West 1988 & Supp. 1993). Both the Corporation Commission and the Supreme Court are given discretionary authority to permit the suspension of the order of the Corporation Commission on the terms set by either body. *Id. See also* Bray v. Cap Corp., 571 P.2d 1224, 1226-1227 (Okla. 1977) (Corporation Commission has the power to stay effectiveness of an order in a "forced pooling" case pending appeal, but the Commission is not required to stay its order), and discussion above at notes 116-119.

155. OKLA. STAT. ANN. tit. 6, § 207(C) (West 1988 & Supp. 1993). The party seeking stay must meet a "cause shown" standard. *Id.*

determinations, or put another way, the greater the cost (or risk) of review.

a. Prior Law

The effectiveness of judgments and appealable orders not subject to automatic stay or to suspension as of right may still be suspended, pending appeal, by securing a stay of execution of judgment.[156] In contrast to suspensions-as-of-right, stays are discretionary.[157] Stays are available for judgments and final orders which are not subject to suspension as of right, except to the extent that such judgments and orders are subject to other provisions regarding suspension pending appeal.[158] Traditionally, discretionary stays have been available to suspend the effectiveness of injunctions,[159] child support, child custody, alimony and counsel fees granted in a divorce decree,[160] garnishment,[161] guardianship,[162] or return of property.[163]

156. *Id.* at tit. 12, § 974.1 (West Supp. 1993). Section 974.1 provides that "execution of the judgment or final order of any judicial tribunal, other than those enumerated in this article, may be stayed on such terms as may be prescribed by the court or judge thereof, in which the proceedings in error are pending."

157. *See* Wilks v. Wilks, 632 P.2d 759, 763, n. 12 (Okla. 1981) (holding that stay "means suspension of the effectiveness [of a [judgment as] a] discretionary act of a trial or appellate court."); Mapco, Inc. v. Means, 538 P.2d 593, 595 (Okla. 1975) ("Where no provision for supersedeas is made by statute, allowance thereof is left to the discretion of trial court, and trial court may, in exercise of its discretion, allow supersedeas or stay on such terms as it may prescribe for protection of parties pending appeal to appellate court."). Generally, judges in Tulsa County, Oklahoma, base their discretionary determination on the clear weight of the evidence. When the judge feels that any potential appeal would be frivolous, they tend to deny the motion to stay. The bonding guidelines used by judges in discretionary stays is approximately the same as for stays as-of-right (judgment plus costs plus attorneys' fees plus three years' interest). Interview with Hon. John C. Reif, Oklahoma Court of Appeals, in Tulsa, Oklahoma (July 1, 1993).

158. The courts retain a "statutory as well as [an] . . . inherent power to grant supersedeas or stay of execution in all cases where the particular statutes are silent on the subject." 1942 Chevrolet Automobile v. State, 128 P.2d 448, 449 (Okla. 1942).

159. Mapco., Inc. v. Means, 538 P.2d 593 (Okla. 1975), City of Del City v. Harris, 508 P.2d 264 (Okla. 1973).

160. Wilks v. Wilks, 632 P.2d 759, 763-764 (Okla. 1981); Jones v. Jones, 612 P.2d 266, 268-269 (Okla. 1980) ("Applications for relief pending disposition of appeal are to be likened to proceedings in which the terms of stay are sought to be arranged and imposed in any ordinary civil case in which supersedeas is not statutorily available."); *but see* Ford v. Ford, 696 P.2d 1027 (Okla. 1985) (explaining that an award in spousal property division, as distinguished from child support, alimony, etc. is subject to suspension as of right).

161. *E.g.,* Missouri, K. & T. Ry. Co. v. Housley, 148 P.689 (Okla. 1915) (allowing stay of judgment in pending action for damages to prevent double recovery where out-of-state garnishment proceeding was potential defense).

162. *E.g.,* New Amsterdam Casualty Co. v. Scott, 234 P. 181 (Okla. 1925) (discussing action against bondsman on guardian's bond in action for misappropriation by the guardian).

163. *E.g.,* Tisdale v. Wheeler Bros. Grain Co., 599 P.2d 1104, 1106-1107 (Okla. 1979) (upholding trial court's impounding of amount of attorneys' fees in dispute because trial court retained authority over such matters ancillary to issues on appeal); 1942 Chevrolet Automobile v. State, 128 P.2d 448, 449 (Okla. 1942) (explaining procedure for the forfeiture of auto).

The initial request for discretionary stays are made to the trial court; otherwise, the appellate court will not entertain a motion for a discretionary stay. Under Oklahoma Civil Appellate Procedure Rule 1.13, applications for discretionary stays must be made within ten days after the judgment is rendered or the order made.[164] However, a staight be sought by motion after the expiration of the ten day period, and even an extension of the automatic stay might be obtained by motion.[165] An order denying a request for a discretionary stay can be reviewed by the Supreme Court by motion and without amendment of the petition in error.[166]

In addition to judgments and final orders of the trial court not subject to suspension as-of-right through supersedeas, discretionary stays are available in a number of other circumstances. Foreign nation money judgments are subject to stay in accordance with the terms of the Uniform Foreign Money-Judgments Recognition Act ("UFMJRA") as enacted in Oklahoma.[167] The UFMJRA as enacted in

164. OKLA. STAT. ANN. tit. 12, ch. 15, App. 2, Rule 1.13 (West Supp. 1993).

165. This option was made explicit in the Rules of Appellate Procedure in Civil Cases before the enactment of the OJAA. OKLA. STAT. ANN. tit. 12, ch. 15, App. 2 R. 1.13 (West 1988) ("If a motion for a new trial is filed, the time to file a supersedeas or motion to stay will begin to run from the date the motion is disposed of. This time limit may be extended by the trial court for good cause shown. A motion to stay may be considered and ruled upon by the trial court after the petition in error has been filed in this court."). *See* Mapco., Inc. v. Means, 538 P.2d 593, 596 (Okla. 1975) ("The phrase 'such party shall file a supersedeas bond or motion to stay within ten days after the decision sought to be reviewed is rendered' means only that the judgment will not automatically be stayed beyond the ten day period unless a motion to stay or motion for new trial is filed within the ten day period"); Howe v. Farmers' and Merchants' Bank, 8 P.2d 665, 668 (Okla. 1932) ("We see nothing in our statutes at all indicating that the right to a stay is lost until the final determination of the appeal, the judgment remaining unexecuted.").

166. Issues involving stays are considered ancillary matters, that is, not issues going to the merits of the appeal. The suggested approach, therefore has been to file a motion directly with the Supreme Court, to which is attached a certified copy of the trial court's order denying the stay. *See* Hon. Marion P. Opala, *What Temporary Relief Can You Get Pending Appeal*, paper delivered at a Program entitled Oklahoma Civil Appellate Procedure, sponsored by the Oklahoma Bar Association, Department of Continuing Legal Education, 1982 *in* OKLAHOMA CIVIL APPELLATE PROCEDURE, at IV-52. The Supreme Court has advised the local bar about its rules in this respect from time to time. *E.g.*, Blair v. District Court of Oklahoma County, 594 P.2d 367 (Okla. 1979) (explaining that trial court retained jurisdiction pending appeal of divorce to consider application for alimony *pendente lite*). The *Blair* Court stated "Bench and Bar should note that it is the express holding of this opinion that all issues ancillary to an appeal in a domestic relations case be first presented to and determined by the trial court, and if a party feel aggrieved by the ruling of the trial court, it may be part of the principal appeal." *Id.* at 369. Appellate court judges tend to defer to the determination of the trial court in matters of discretionary stays. Interview with Hon. John C. Reif, Oklahoma Court of Appeals, in Tulsa, Oklahoma (July 1, 1993).

167. OKLA. STAT. ANN. tit. 12, §§ 710-718 (West 1988 & Supp. 1993). Section 710 defines a foreign state as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof or [certain territories of or areas administered by the United States]." *See* Vicki E. Lawrence and Stephen D. Milbrath, Note, *Conflict of Laws*, 2 OKLA. CITY U. L.REV. 98, 107 (1977).

Oklahoma gives the courts discretionary power to stay execution of foreign money judgments where the defendant satisfies the court either that an appeal is pending or that he intends to file a valid appeal.[168] District courts apparently have less discretion under the Uniform Enforcement of Foreign Judgments Act ("UEFJA").[169] Upon a showing that an appeal from the foreign judgment is pending or will be filed, or that a stay of execution has been granted, the district court is required to stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal has expired or the stay of execution expires or is vacated.[170] The protections of the UEFJA are available only if the judgment creditor elects to register the foreign judgment in accordance with its terms. However, "the right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this act remains unimpaired."[171]

Enforcement of agency decisions are subject to discretionary stays during the pendency of proceedings for review, "upon such terms as it deems proper."[172] Such stays may be granted by the agency itself or the reviewing court.[173] A narrow exception to the discretion of the reviewing court or agency in connection with the suspension of agency decisions is provided when the enforcement of the agency's determination would "result in present, continuous and irreparable impairment of the constitutional rights of the applicant."[174]

168. OKLA. STAT. ANN. tit. 12, § 715 (West 1988). Execution of such judgments can be suspended until the appeal is determined or until the period for perfecting a valid appeal has expired. *Id.* The UFMJRA does not prevent recognition of foreign judgments in situations not covered. *Id.* § 716.

169. *Id.* §§ 719-726 (West 1988 & Supp. 1993). The UEFJA deals only with the judgments of courts of the United States and of sister states (that is courts whose proceedings are entitled to full faith and credit in Oklahoma). *Id.* § 720. Thus, the scope and purpose of the UEFJA is substantially distinct from that of the UFMJRA; the former was designed to decrease the burden of enforcing judgments entitled to full faith and credit, the latter was enacted to expedite the recognition of foreign nation money judgments in most instances. *See* Willhite v. Willhite, 546 P.2d 612 (Okla. 1976) (discussing the differences between the two uniform laws). For a discussion of the UEFJA, see Lawrence & Milbrath, *supra* note 167, at 98-106.

170. OKLA. STAT. ANN. tit. 12, § 723(a) (West 1988 & Supp. 1993).

171. *Id.* § 725. As such, the remedies under the UEFJA are both optional and cumulative. Hudson v. Hudson, 569 P.2d 521, 523 (Okla. 1976). There are, thus, two methods of enforcing foreign judgments in Oklahoma, by registration pursuant to the UEFJA and by a common-law action on the foreign judgment. *See* First of Denver Mortgage Investors v. Riggs, 692 P.2d 1358, 1361-1362 (Okla. 1984) (holding that a money judgment obtained in Colorado filed in Oklahoma under UEFJA is subject to Oklahoma statute of limitations on enforcement). In support actions, a further remedy is afforded under the Uniform Reciprocal Enforcement of Support Act, OKLA. STAT. ANN. tit. 43, §§ 301 *et seq.* (West 1990). *See Hudson*, *supra*, at 523.

172. OKLA. STAT. ANN. tit. 75, § 319(1) (West 1987).

173. *Id.*

174. *Id.* § 319(2). This exception may be ordered either by the reviewing court or the agency itself. *Id.* § 319(1).

In such a case, suspension of the agency determination is mandatory upon the filing of a supersedeas bond in amount sufficient to cover injuries to adverse parties and the public resulting from the stay.[175] Suspension of the effectiveness of orders of the Banking Board or the Bank Commissioner lies within the discretion of the Supreme Court.[176]

Thus far, only suspension of judgments and final orders have been considered. However, appealable interlocutory orders are subject to stay pending appeal under certain circumstances.[177] If the order appealed discharges or modifies an attachment or temporary injunction and it becomes operative, then the undertaking originally given at the time of the granting of the attachment or temporary injunction automatically stays the enforcement of the order until the effective date of a final order of discharge.[178] Statutory law also appears to permit suspension as-of-right of orders granting temporary injunctions during the pendency of an appeal thereof, upon the posting of an undertaking approved by the court.[179] The Supreme Court, however, has interpreted the statute as permitting only discretionary stays of the effectiveness of temporary injunctions.[180] Likewise, stays of *pendente lite* arrangements for custody, alimony and support payments, for which no automatic stays are allowed, are permitted only in the discretion of the court.[181] For receivership proceedings, a bond is required for suspension but not to appeal the order approving or refusing to approve appointment of a receiver.[182] Not all orders relating

175. *Id.* § 319 (2). The statute provides for an automatic stay if the application for stay is not acted upon within 45 days, the application was accompanied by a proposal for a supersedeas bond, and the application was commenced at the time the bond proposed is filed.

176. *Id.* at tit. 6, § 207(C) (West 1988). The party seeking stay must meet a "cause shown" standard. *Id.*

177. *See id.* at tit. 12, § 993 (West 1988 & Supp. 1993).

178. *Id.* § 993(B).

179. *Id.* § 993(C).

180. National Collegiate Athletic Ass'n v. Owens, 555 P.2d 879, 881-882 (Okla. 1976).

181. *See* Jones v. Jones, 612 P.2d 266 (Okla. 1980) (holding that in a matrimonial action in which no alimony was allowed, trial court has the authority to entertain wife's post decree application for alimony and counsel fees after husband's appeal from divorce decree had been brought to the Supreme Court); Blair v. District Court of Oklahoma County, 594 P.2d 367 (Okla. 1979) (holding that trial court retained jurisdiction pending appeal of divorce to consider application for alimony *pendente lite*); Enyart v. Comfort, 591 P.2d 709 (Okla. 1979) (ruling that trial court has power to consider motion to modify child custody, based on changed conditions, during the pendency of an appeal from the then-current custody order); Cochran v. Rambo, 484 P.2d 500, 501 (Okla. 1971) (noting that stay provision of [OKLA. STAT. tit. 12, § 1282 (West 1988 & Supp. 1993)] does not divest the trial court of its right to temporarily provide and care for children during pendency of appeal of a divorce decree).

182. OKLA. STAT. ANN. tit. 12, § 993(D) (West 1988 & Supp. 1993); Cameron v. White, 262 P. 664, 670-671 (Okla. 1928) ("Therefore, the failure to give supersedeas bond in such a case as

to the appointment of a receiver are appealable. The Oklahoma courts have made clear that they will not broadly read the statute permitting appeals of such orders. Only orders of the trial court refusing to appoint or refusing to vacate the appointment of a receiver are appealable. Appeals directly from an order of appointment are not immediately reviewable, and supersedeas is unavailable in such cases.[183]

b. House Bill 1468 Changes

Parallelling its approach to the automatic stay provisions of section 990.3, House Bill 1468 creates a complex framework for determining the availability of discretionary stays. This framework is based on the creation of two distinct classes of judgments for which such stays may be available. Like its counterpart in section 990.3(C), new section 900.4(C) identifies a number of proceedings for which the statute creates a presumption against the availability of automatic stay, but with respect to which the trial court retains discretionary authority to stay the effectiveness of the judgment. The section represents an attempt to clearly identify the proceedings which are not subject to stays as of right. The result, however, may be additional complexity. The actions identified consist of some, but not all of the actions identified in new section 990.3(C) and for which a statutory presumption against automatic stay is created.[184] While many of the proceedings identified have traditionally been categorized as proceedings where

this—the only effect would be to permit the receiver to act, to take possession of the property and to perform the duties of his office."). *See also* Commerce Bank of Kansas City v. Chadwell, 635 P.2d 609, 610 (Okla. 1981) (dismissing appeal, court confirms that case law from prior to enactment of OKLA. STAT. ANN. tit. 12, § 993 is still good law; the court reapplies old case law interpreting now-repealed OKLA. STAT. tit. 12, § 1558 (1961) to the receivership provisions of § 993(D)).

183. *See* Commerce Bank of Kansas City v. Chadwell, 635 P.2d 609, 610 (Okla. 1981) (dismissing appeal from order of appointment where no evidence in record of denial of motion to vacate appointment).

184. *Compare* OKLA. STAT. tit. 21, § 990.3(C) (enumerating 17 causes of action), *with* OKLA. STAT. tit. 21, 990.4(C) (enumerating 11 of the same 17 causes of action). While an argument can be made that discretionary stays are unavailable for the causes of action omitted from § 990.4(C) but included in § 990.3(C), the better argument is that such actions may be stayed pursuant to the catch-all discretionary stay power of courts under § 990.3(D). In light of the broad language of § 990.3(D), it would be difficult to argue that the legislature meant to eliminate the court's power to stay its judgments in certain cases by mere implication. *See* Committee Comments to § 990.4, at note 41, above. Moreover such an action would be beyond the power of the legislature under the separation of powers doctrine. *See* National Collegiate Athletic Association v. Owens, 555 P.2d 879 (Okla. 1976). The result, of course, is odd, because while §§ 990.3(C) and 990.4(C) created a class of judgments for which stays ought to be difficult to obtain, some of the causes of action for which automatic stays are presumptively unavailable will be presumptively entitled to discretionary stay upon a filing of a notice of appeal or motion for new trial.

there is no right to a stay.[185] But the enumerated proceedings also appear to include actions not traditionally subject to the discretionary stay rules. Thus, under prior law, an award in a spousal property division, as distinguished from child support or alimony was subject to a stay of execution by a supersedeas bond as a matter of right.[186] Under new section 900.4(C) such awards might conceivably come under "actions for divorce" or "post-decree matrimonial proceedings," in connection with either of which only discretionary stays are available. Likewise, the new statute overturns old case law which held that the appellant had the right to suspend judgment in a paternity action.[187]

In addition to the proceedings for which limited discretionary power to stay judgment is provided, new section 990.4(D) creates a second class of judgments for which discretionary stays are available. This section acts, like its prior law counterpart, as a catch-all provision. In all actions not specified in any of the previous sections of the provision, any judgment, decree or final order may be stayed in the discretion of the court, and upon the terms set by the court.[188] In other respects, the law of discretionary stays accords with prior case law which held that the courts have inherent authority to control their judgments and to suspend their effectiveness.[189] While the catch-all provision under the new law might seem to cover all other actions, it is unlikely to be so broadly construed. Like its predecessor, this section will not disturb the special stay rules currently in effect. Thus, the amendment leaves undisturbed the manner specified for the stay of enforcement of out-of-state judgments under the Uniform Foreign Money-Judgments Recognition Act ("UFMJRA") as enacted in Oklahoma, and the Uniform Enforcement of Foreign Judgments Act ("UEFJA").[190] Enforcement of agency decisions is subject to discretionary stays during the pendency of proceedings for review by the agency or the reviewing court, "upon such terms as it deems

185. Thus, for instance, the cluster of money payments and child custody determinations which are ancillary to the determination of a divorce have been subject to discretionary stay, not stays as of right. *E.g.*, Wilks v. Wilks, 632 P.2d 759 (Okla. 1981) and discussion above at notes 36, 39, 157, and 160. Under prior law there was no right to a stay of temporary injunctions. National Collegiate Athletic Ass'n v. Owens, 555 P.2d 879, 881-882 (Okla. 1976).

186. Ford v. Ford, 696 P.2d 1027 (Okla. 1985).

187. *Ex parte* Lowery, 231 P. 86, 87 (Okla. 1924); *but see* State v. McCain, 637 P.2d 72, 74 (Okla. 1981) (holding that trial court has continuing jurisdiction to determine matters respecting support which are ancillary to paternity claim during appeal).

188. Prior law worked substantially the same way. OKLA. STAT. ANN. tit. 12, § 974.1 (West 1988 & Supp. 1993).

189. Mapco., Inc. v. Means, 538 P.2d 593, 595 (Okla. 1975).

190. OKLA. STAT. ANN. tit. 12, §§ 710-718 (West 1988 & Supp. 1993) (UFMJRA); *id.* §§ 719-726 (UEFJA).

proper."[191] Suspension of the effectiveness of orders of the Banking Board or the Bank Commissioner lies within the discretion of the Supreme Court.[192] Stays of appealable interlocutory orders, other than temporary injunctions (already discussed) remain substantially unchanged,[193] as do the provisions governing stays of *pendente lite* arrangements for custody, alimony and support payments.

4. Discharge of Lien and Suspension by Payment of Judgement

The relationship between judgment liens and suspensions of judgments has had a somewhat confusing history in Oklahoma. The extent to which a judgment lien actually acts to suspend the effectiveness of a judgment, muddled under prior law, has been clarified by House Bill 1468, making it easier for judgment debtors in money judgment cases to simultaneously discharge a judgment lien and obtain a stay of execution. Unfortunately, the new law retains the foibles of prior law with respect to the effect of accepting the benefits of a judgment (the loss of the right to appeal) versus paying the judgment creditor during the course of an appeal (the loss of the right to appeal depends on the state of mind of the appellant at the time payment is made).

a. Prior Law

Judgments can be inconvenient, even during the pendency of an appeal, and even after a stay has been obtained (whether or not as-of-right). They are especially so to a solvent judgment debtor contemplating transactions in real property who is faced with a filed judgment lien.[194] Oklahoma permits judgments of state courts of record to be liens on the real estate of the judgment debtor upon the filing of a

191. *Id.* at tit. 75, § 319(1) (West 1987).

192. *Id.* at tit. 6, § 207(C) (West 1988). The party seeking stay must meet a "cause shown" standard. *Id.*

193. House Bill 1468, § 22, *amending* OKLA. STAT. tit. 12, § 993.

194. The Supreme Court in discussing the effects of a pre-judgment attachment of real property, succinctly described the effects of attachment in words equally applicable to judgment liens:

> For a property owner . . ., attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.

Connecticut v. Doehr, 111 S. Ct. 2105, 2113 (1991); *see* Grand River Dam Auth. v. Eaton, 803 P.2d 705, 707 (Okla. 1990) (describing the potential for seizing property even after a judgment lien is discharged). The judgment lien attaches only to real property; personal property is unaffected. *See* First National Bank of Healdton v. Dunlap, 254 P.2d 729, 731-732 (Okla. 1972) (holding that an oil and gas lease not real estate subject to judgment lien provisions); *cf.* Burchfield v. Bevans, 242 F.2d 239, 241 (10th Cir. 1957) (interpreting Oklahoma law).

certified copy of the judgment in the office of the county clerk.[195] And, this right to file a judgment lien may not be abridged by order of the trial court.[196] Judgment liens, however, do not establish a security interest in the personal property of the judgment debtor. Such a lien is usually established by execution.[197] Most importantly, for our purposes, the filing of the required undertakings and the giving of adequate supersedeas does not discharge the lien of judgment, it merely tolls the period during which execution must be issued in order to preserve the lien itself.[198]

While the power to lien real property may appear substantially justified (fair) in cases where the liened property is the subject, either directly or collaterally, of the dispute between the parties,[199] it might

195. OKLA. STAT. ANN. tit. 12, § 706 (West 1988 & Supp. 1993). The purpose of the lien is to secure the judgment debtor's obligation to pay the judgment much in the same way as a mortgage secures a mortgagor's obligation to pay a note. Judgment liens are especially useful where a judgment debtor is subject to a number of judgments or other claims. The judgment lien, by creating a security interest in property out of which the judgment might be satisfied before other creditors (other than those with superior rights to the property) may resort to the property for satisfaction. *See* Anita M. Moorman, *Judgments: Getting Your Judgment and Keeping Your Judgment, in* COLLECTING JUDGMENTS IN OKLAHOMA 99, 109 (1992) (Paper presented on September 11, 1992, in Oklahoma City, Oklahoma). The lien arises only if the certified copy of the judgment is filed with an affidavit of judgment (a form generally available from the court clerk) in the manner provided in the statute. The lien is effective only in the county in which it is filed. Where a judgment creditor owns real property in several counties, multiple filings will have to be made in order to place a lien on all of the property. *See* OKLA. STAT. ANN. tit. 12, § 706 (West 1988 & Supp. 1993) (judgment liens are liens within a county if properly filed); Moorman, *supra*, at 110. Preservation of the lien priority of the judgment lien is subject to other requirements as well. *E.g.,* OKLA. STAT. ANN. tit. 12, § 801 (West 1988) (stating judgment lien ineffective unless an execution on the judgment is issued within one year from the date of the rendition of the judgment); *id.* § 735 (West 1988 & Supp. 1993) (stating judgment loses its effect and ceases to operate as a lien on real estate if execution is not issued by court clerk within five years).

196. *See* Farris v. Cannon, 649 P.2d 529, 530-531 (Okla. 1982) (ordering injunction of judgment creditors from placing judgment of record in office of county clerk or in any other such office within the state unauthorized by law).

197. Thus, OKLA. STAT. ANN. tit. 12, § 734 (West 1988) provides that all real estate, not otherwise bound by a judgment lien, and all items of personal property of a judgment debtor are bound from the time they are seized in execution. Pursuant to section 759(A) of that title, a certified copy of the execution must be filed in the office of the county clerk in the county or counties to which the writ was directed and indexed like judgments. *See generally,* Mac D. Finlayson, *Getting Your Money—Possessory Actions, in* COLLECTING JUDGMENTS IN OKLAHOMA 177, 193 (1992) (Paper presented on September 11, 1992, in Oklahoma City, Oklahoma).

198. *E.g.,* Jarecki Mfg. Co. v. Fleming, 64 P.2d 659, 660 (Okla. 1937) (holding that for recovery in replevin action for possession of drilling tools, five year period for executing judgment tolled during time action is appealed and judgment stayed; construing [OKLA. STAT. ANN. tit. 12, § 735 (West 1988 & Supp. 1993)]). In any case, because of the security requirements of bonding companies, obtaining a supersedeas bond to suspend effectiveness may require permitting the bonding company to secure its claim with an interest in the judgment debtor's real property. The net effect, of course, is to leave the judgment debtor's property burdened with liens.

199. After all, it is, in those cases, the interests of the disputants in particular real property which is the subject of the dispute. As such, that particular property ought to be made especially available for execution.

appear substantially less justified, given its collateral effect, where there is no relation between the dispute and the property. Where the judgment loser can provide other security for the payment of the judgment during the pendency of an appeal the power is especially unjustifiable. Oklahoma has traditionally recognized this lack of justifiability, to a certain extent, by permitting the lien of a money judgment to be discharged, pending appeal, by deposit of "cash sufficient to cover the whole amount of the judgment, including interest, costs, and any attorneys' fees, together with costs and interest on the appeal."[200] This cash payment must be accompanied by a written statement indicating that the payment is made to discharge the lien of such judgment and any lien by virtue of an attachment issued and levied in the action.[201] Thereafter, the judgment will be paid out of the deposit in the event it is affirmed.[202] Where remedies other than money judgments are awarded, the statutory right to discharge the lien is not available.[203]

The discharge of the judgment lien in a money judgment has the effect of suspending any execution and levy of the judgment on real property.[204] It thus serves as a supplement to the general rules of supersedeas for suspending the effectiveness of a money judgment, again, at least as against real property.[205] The primary difference between them is that a supersedeas does not discharge the lien of judgment against the judgment debtor's real property, the discharge of lien

200. OKLA. STAT. tit. 12, § 706.2 (West 1988). Judgment creditors may, at any time, by motion, request that the court order the deposit of additional cash, if the judgment creditor can show that the cash deposited is insufficient to cover the whole amount of the judgment, "including interest, costs, and any attorneys' fees, together with costs and interest on the appeal." *Id.* § 706.3.

201. *Id.* § 706.2; *see, e.g.,* Farris v. Cannon, 649 P.2d 529, 532 (Okla. 1982) (permitting judgment creditor to secure this statutorily authorized lien discharge and explaining the nature and scope of the discharge).

202. *See* OKLA. STAT. ANN. tit. 12, § 706.2 (West 1988).

203. Resort to OKLA. STAT. ANN. tit. 12, § 706.2 (West 1988), which is limited, on its face, to money judgments. *Cf.* R. Clark Musser, *1982 Decisions of Interest Pertaining to Real Property*, 54 OKLA. B.J. 507, 512, 514 (1983).

204. Grand River Dam Auth. v. Eaton, 803 P.2d 705, 710 (Okla. 1990) (Opala, V.C.J., concurring in part and dissenting in part); Farris v. Cannon, 649 P.2d 529, 532 (Okla. 1982); *see* Steven L. Barghols, *Judgment Enforcement Against Real and Personal Property: Practical Considerations*, 61 OKLA. B.J. 3402, 3403 (1990). However, it is hard to see, in the black letter law, any substantial justification for this position, other than perhaps the unfairness of a contrary result. The statutes, thus, appear to permit execution on personal property even after a judgment lien on real property has been discharged. But it appears grossly unfair since in order to obtain the discharge, the judgment creditor had to deposit the amount of the judgment with the court clerk. Execution, even limited execution, in this context, would amount to double payment.

205. *See Grand River*, 803 P.2d at 710 (Opala, V.C.J., concurring in part and dissenting in

provisions does.[206] For a judgment debtor seeking transactions in real property, and whose contractual obligations may be jeopardized by the continued existence of a lien of record on real property, supersedeas provides illusory relief and real danger; discharge of the lien by cash deposit provides the better alternative. Where no money judgment lien is filed, however, supersedeas remains the primary means of suspending the effectiveness of money judgments. However, since judgment liens are an effective tool for a judgment creditor, and as a practical matter, judgment creditors are advised, and it is normal practice, to perfect their judgment liens whenever they receive judgment in their favor, a judgment debtor will more often than not face the prospect of having his real property liened.[207] Consequently, many judgment debtors will have a choice respecting the manner in which they will suspend the effectiveness of adverse money judgments against real property.

The relationship between supersedeas and discharge of judgment liens in money judgment cases presents certain problems for practitioners and the potential for sharp practice. First, discharges of judgment liens do not, as a theoretical matter, apply to personal property. As such, a judgment creditor might be able to execute against personal property even as execution is stayed as against the judgment debtor's real property discharged from the judgment lien.[208] Second, and more serious for a judgment debtor, are the problems which can

part) ("The Legislature has provided *but* two specific methods by which a judgment's effectiveness may be suspended pending appeal to afford a judgment debtor protection from mid-appeal execution and from the operation of the judgment lien law—one is by supersedeas bond and the other is by cash deposit." (*footnotes omitted*)).

206. Funk v. First National Bank of Miami, 95 P.2d 589, 589-590 (Okla. 1939) ("The taking of the appeal and filing of the supersedeas bond, did not suspend or devitalize the lien of a plaintiff's judgment, but merely prevented the enforcement thereof against the property of [the] intervenor pending determination of the appeal.") *approved in* Farris v. Cannon, 649 P.2d 529, 532 (Okla. 1982). Other differences exist respecting the form of undertaking, and the manner and amount of payment necessary to make the undertaking in supersedeas or to discharge the judgment lien. *See* OKLA. STAT. ANN. tit. 12, § 968.1 (Supp. 1993).

207. *See, e.g.*, Anita M. Moorman, *Judgments: Getting Your Judgment and Keeping Your Judgment, in* COLLECTING JUDGMENTS IN OKLAHOMA 99, 109-110 (1992) (Paper presented on September 11, 1992, in Oklahoma City, Oklahoma).

208. See discussion at note 204 above. A common sense approach to this problem might be to permit the judgment debtor to stay execution automatically upon the discharge of a judgment lien as against all of the judgment debtor's property. The rationale for this result would be that the judgment creditor's interest is secured by the cash deposit made to discharge the judgment lien. However, since the effectiveness of the judgment itself has not been suspended, the prudent judgment debtor might still seek a stay of execution from the court, offering the cash deposit in satisfaction of the required undertaking. Under prior law, though, even this was problematical, since the required undertaking in money judgment cases was for double the amount of the judgment and the discharge of the judgment lien was made by the deposit of the amount of the judgment plus costs. Securing the stay with a bond might rob the judgment

arise from the fact that the judgment debtor is not permitted to anticipate the filing of a judgment lien, and seek a stay (at least as against his real property) by seeking a discharge. It is, thus, possible to wait until the judgment debtor has secured a supersedeas bond to stay the effectiveness of a judgment before actually filing a judgment lien. In order to discharge the lien (if that were necessary to effect a transaction in the real property affected), the judgment debtor would be forced to deposit an additional amount of cash with the court clerk in accordance with the requirements of the statute or seek permission of the court to discharge the bond and substitute a sufficient cash payment with the court in accordance with the lien discharge requirements. Having diverted financial resources to the procurement of the supersedeas bond, the judgment debtor might be unable to raise sufficient cash to make the required deposit. The judgment debtor, in any case, might not have sufficient cash readily available. For a judgment debtor needing to effect real property transactions in this context, the cost of appeal might become large enough that abandonment or settlement prior to the conclusion of the appeal might become a more attractive alternative—even where the merits of the appeal are strong. In this sense, at least, the appellate rules could work for the benefit of judgment creditors irrespective of the legal merits of their position.

Another serious problem for judgment debtors arises when payment of a judgment is made directly to the judgment creditor (and not to the clerk of the court) in order to discharge the lien of judgment. This approach has the benefits of effectively removing a liability from the accounting records of corporate judgment debtors, stopping the accrual of post-judgment interest and saving the expense of securing a surety bond. However, this type of action can have serious effects on the viability of an appeal for the careless appellant. Traditionally, where a contrary intent is not evidenced by the posting of a supersedeas bond, payment of a judgment moots the appeal of the payor.[209] However, in *Grand River Dam Auth. v. Eaton*,[210] the Supreme Court narrowed the traditional rule by holding that the payment of the judgment will not moot the appeal unless it can be shown that the payment

debtor of his goal, to free real property from liens, since the bonding company might require a lien on real property in order to guarantee the undertaking.

209. Pixley Lumber Co. v. Woodson, 556 P.2d 596, 597-98 (Okla. 1976) (explaining acquiescence in judgment implied where partial payment made and no supersedeas procured); *see also* Grand River Dam Auth. v. Eaton, 803 P.2d 705, 709 (Okla. 1990); *cf.*, Wallace v. Boston Mutual Life Insurance Co., 172 P.2d 629 (Okla. 1946) (explaining that payment of judgment implies acquiescence on part of judgment debtor);

210. 803 P.2d 705 (Okla. 1990).

was made with the intent to settle the case, or that the payment effectively made reversal of the judgment impossible.[211] While this holding might well result in a number of disputes concerning the intent of the judgment debtor in making the payment,[212] it serves to eliminate a trap for the careless or unwary appellant without harming the ultimate interests of the appellee.[213] However, the holding of *Grand River* does not protect the appeal right of judgment winners who accept the payment of a judgment. The Supreme Court carefully distinguished from its holding, those cases mooting the appeal of litigants who had accepted the benefits of a judgment below.[214]

b. *House Bill 1468 Changes*

House Bill 1468 substantially amends the rules relating to discharging judgment liens,[215] but does not change prior case law rules regarding the effect of the payment of judgments directly to judgment

211. *Id.* at 709-710 ("We therefore hold that unless the payment of a final judgment by a judgment debtor is shown to be made with the intent to compromise or settle the matter and, thus, to abandon the right to appeal or the payment in some way, not involved here, makes relief impossible in case of reversal, the payment will not be deemed to either waive the right to appeal or moot the controversy."). For a discussion of the case, see Charles W. Adams and J. Michael Medina, *Recent Developments in Oklahoma Civil Appellate Procedure*, 26 TULSA L.J. 489, 515-517 (1991). Concurring in part and dissenting in part, Justice Opala suggested that the holding be narrowed to provide for protection against dismissal in these circumstances only if the judgment debtor indicated that the payment was being made "under protest," and the funds were to be placed in an interest bearing account. *Grand River*, *supra*, at 713.

212. *Grand River*, 803 P.2d at 710-712 (Okla. 1990) (Opala, V.C.J., concurring in part and dissenting in part) ("The new rule has the potential of generating needless factual disputes in *every* appeal in which the judgment is *paid* rather than being *secured* by one of the two authorized statutory methods.").

213. For a discussion of the benefits of this approach to litigants, see Adams & Medina, *supra* note 211, at 516.

214. The Supreme Court has held unanimously that acceptance of the benefits of a part of a judgment favorable to an appellant constitutes a waiver of that appellant's right to appeal as to the other parts of the judgment. Tara Oil Co. v. Kennedy & Mitchell, Inc., 622 P.2d 1076, 1077-78 (Okla. 1981) (discussing that appellant lost his right to appeal a pooling order by accepting a cash bonus in lieu of a participation in the drilling of a unit well). *See* Robert J. Emery, *Appeals From the Corporation Commission*, paper delivered at a Program entitled Oklahoma Civil Appellate Procedure, sponsored by the Oklahoma Bar Association, Department of Continuing Legal Education, 1982 *in* OKLAHOMA CIVIL APPELLATE PROCEDURE, at VI-17-18 (discussing *Tara*). The Supreme Court in *Grand River*, in approving this rule, explained that "[w]hen the appealing party accepts the benefits of a judgment and at the same time seeks to reverse detrimental parts of it the inconsistency of such conduct is generally apparent. Normally, in such a situation the appeal should be dismissed because such acts are fatally inconsistent with proper appellate procedure." *Grand River Dam*, 803 P.2d at 709 n. 2. However, commentators have argued that the logic of *Grand River* might be as compelling for the recipient of the payment as for the maker. *See* Adams & Medina, *supra* note 211, at 517.

215. *See* House Bill 1468, §§ 13-15, *amending* OKLA. STAT. ANN. tit. 12, §§ 706-706.3 (West 1988 & Supp. 1993). Amended OKLA. STAT. ANN. tit. 12, § 706 substantially rewrites the old law prescribing new procedures for the handling of judgment liens. A discussion of those changes is beyond the scope of this paper.

winners.[216] Judgment liens are to be created by the filing of a "Statement of Judgment" in the office of the county clerk where the real property is located.[217] However, the new law does not substantially alter the power of a judgment loser to discharge the lien of judgment, or the types of judgments which are subject to the lien discharge rules.[218] The provisions have been amended to make it clear that discharge is permitted on appeal to the appellate courts as well as to the Supreme Court and that the judgment creditor may petition the trial court (and not the appellate courts) for an increase in the amounts deposited to discharge the lien in the event the judgment creditor can show that the amount is insufficient.[219]

The amendments also seem to imply that a discharge of judgment liens acts essentially as a stay of execution of a judgment, and that its reimposition may act to void an existing stay of execution.[220] The new act may make it possible to fuse supersedeas and lien discharge proceedings by making a single payment to the court clerk. The practical merger of these two methods of staying enforcement of money judgments—by supersedeas and by discharge of judgment lien—is tricky.

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216. *See* discussion above at notes 209-214.

217. House Bill 1468, § 13, *amending* OKLA. STAT. ANN. Tit. 12, § 706(A) (West 1988 & Supp. 1993). This "Statement of Judgment" is to be prescribed by the Administrative Director of the Courts. *Id.* The filing of papers other than the Statement of Judgment will not operate to create a valid lien; although they can serve as "notice of its contents, whether or not recording is required by law." House Bill 1468, § 13, amending OKLA. STAT. ANN. tit. 12, § 706(E) (new).

218. The new rules require the court clerk to place the cash deposit in an interest bearing account, absent contrary instructions from the court. It provides the judgment creditor with a fifteen (15) day period in which to object to the discharge of the judgment lien. It also conforms the manner of discharge to the new judgment lien provisions of section 706. House Bill 1468, § 14, *amending* OKLA. STAT. ANN. tit. 12, § 706.2 (West 1988).

219. House Bill 1468, §§ 14-15, *amending* OKLA. STAT. ANN. tit. 12, §§ 706.2-706.3 (West 1988 & Supp. 1993).

220. Referring to the reimposition of a judgment lien upon the failure of the judgment loser to increase the amount of his deposit, the new provision states that the "creditor may thereafter file a Statement of Judgment, which shall create a lien effective upon its filing with the county clerk as provided in Section 706 of this title, and may enforce the judgment against the property of the judgment debtor including the cash previously deposited with the court clerk." House Bill 1468, § 15, *amending* OKLA. STAT. ANN., tit. 12, § 706.3 (West 1988). This language could be interpreted to mean that the reimposition of a judgment lien permits execution of judgment even if there exits a valid undertaking given in accordance with new OKLA. STAT. tit. 12, § 900.4(B). On the other hand, the language implies that the discharge of the lien of judgment effectively prevents execution of a judgment at least against real property. But, the purpose of judgment liens is not to permit execution, but to preserve priority upon execution where more than one creditor seeks satisfaction of its or their obligation from out of the real property of the judgment debtor. Consequently, courts should interpret the language in context, despite any future temptation to use the language as an excuse to modify (broaden) the effect of the judgment lien provisions or to modify (narrow) the effect of the supersedeas provisions in a money judgment case.

It is possible, but only when the judgment debtor pays with cash. Payment by cash equivalent, U.S. Treasury Notes or Oklahoma General Obligation Bonds, permitted to satisfy supersedeas requirements, remain ineffective means of discharging a judgment lien. Both practitioners and the courts will have to exercise some care in distinguishing one from the other in order to prevent an ineffective discharge of judgment lien or stay of execution.[221]

B. *The Changes to The Power to Sanction Frivolous Appeals*

Traditionally, Oklahoma courts have been reluctant to adopt an aggressive approach to the sanctioning of frivolous appeals. Holders of the ultimate sanctioning power, affirmance or reversal of a lower court judgment on the merits, the appellate courts have had less need to resort to additional "punishments" of those who unnecessarily resorted to the appellate process for questionable purposes. Further, and significant in the view of the Oklahoma Supreme Court, the parties' right to appeal must be preserved. The power to sanction appeals could thwart the right to appeal by unnecessarily adding to the potential cost of seeking review, and Oklahoma appellate courts have consciously refrained from using the sanction power to diminish the statutory right to appeal in this backhanded manner.[222] Thus, the reluctance to impose sanctions reflects the traditional consensus that the cost of appeal ought not generally to increase because of a determination respecting the weightiness of the arguments raised on appeal.[223] However, this reluctance has not prevented the imposition of sanctions, at least in the most extreme cases. As such, the possibility of

221. *See* Grand River Dam v. Eaton, 803 P.2d 705, 710-711 (Okla. 1990) (Opala, V.C.J., concurring in part and dissenting in part).

222. Thus, the *TRW/REDA Pump* court went out of its way to

> make it plain [that] it *is not* our purpose to chill the filing of arguably meritorious appeals in workers' compensation cases or any other type of litigation[,] and it would be improper for us to attempt to do so. However, . . . patently frivolous appeals, . . . are those which have absolutely no legitimate legal or factual basis and should not be mistaken for those having some arguable merit, though ultimately unsuccessful. Thus, such appeals cannot be said to be protected by the statutory right of appeal without the additional probability attorney fees will be extracted upon a determination of patent frivolity.

TRW/REDA Pump v. Brewington, 829 P.2d 15, 22 (Okla. 1992).

223. Similar concerns have resulted in the substantial modification of the sanctioning rules under Rule 11 of the Federal Rules of Civil Procedure under rules changes effective December 31, 1993. The Committee Comments explain that among the purposes of the revisions was the effort to decrease the resort to the rule "to emphasize the merits of a party's position, to extract an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, [or] to create a conflict of interest between attorney and client. . . ." FED. R. CIV. P. 11 (Committee Notes 1993 Amendment).

sanctions retains its effect as a potentially costly element of any appeal. And the uncertainty of the size of this risk of imposition of this cost increases to the extent that meritlessness depends on a post facto characterization by the court reviewing the lower court's determination.[224] House Bill 1468 provides the judiciary with a potentially powerful new weapon to use against what it may consider frivolous appeals. It remains to be seen to what extent the appellate courts will actually utilize this new authority. I first consider traditional sources of the appellate sanctioning power. I then examine the new authority to sanction frivolous appeals provided by House Bill 1468.

1. Prior Law

Traditionally, Oklahoma has recognized both a common law and a statutory source for the power to "punish" litigants interposing frivolous appeals.[225] The common law source of the power to sanction litigants bringing meritless appeals derives from a well established exception to the "American Rule,"[226] that recognizes that a court has the inherent equitable power to award attorneys' fees whenever overriding considerations make such an award just. Generally, these overriding equitable considerations have been limited to findings that the sanctioned party acted in bad faith, vexatiously, wantonly, or for oppressive reasons.[227] Monetary awards are not the only means of dealing with meritless appeals under the common law authority of courts.

224. *See* Harlan Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985).

225. *See, e.g.*, Melinder v. Southlands Dev., Inc., 715 P.2d 1341 (Okla. 1985) (taxing as costs attorneys' fees in favor of appellee for defending frivolous and vexatious appeal brought in bad faith and for delay only under court's inherent powers and pursuant to [OKLA. STAT. ANN. tit. 20, § 15.1 (West 1988 & Supp. 1993)]).

226. The American Rule provides that attorneys' fees are not allowed as costs to a prevailing party in the absence of statutory or specific contractual authority or where such fees are considered part of the damages suffered by a party. *See, e.g.* Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 257-259 (1975); City National Bank and Trust Co. v. Owens, 565 P.2d 4, 7-9 (Okla. 1977) (awarding attorneys' fees against plaintiff who dismissed case without prejudice after the presentation of all of the evidence at trial); TRW/REDA Pump v. Brewington, 829 P.2d 15, 22 (Okla. 1992) (awarding attorneys' fees for frivolous appeal pursuant to statute). "The American Rule where each litigant bears the cost of his/her legal representation is firmly established in Oklahoma and courts are without authority to award attorney fees in the absence of a specific statute or contract." *Id. See also* Kay v. Venezuelan Sun Oil Co., 806 P.2d 648, 650 (Okla. 1991) (dicta, but see cases cited therein in support of the proposition).

227. *See, e.g.*, Best v. State, 736 P.2d 171 (Okla. App. 1987) (noting costs may be awarded against party making frivolous appeal); Melinder v. Southlands Dev., Inc., 715 P.2d 1341 (Okla. 1985) ("The Court agrees with appellee's suggestion that this appeal is brought in bad faith and only for the oppressive purpose of delay.... The Court therefore taxes as costs attorneys' fees in favor of appellee and against appellant."); City National Bank and Trust Co. v. Owens, 565 P.2d 4, 7 (Okla. 1977) ("Courts have long recognized that attorney fees may be awarded when an

The appellate courts also have inherent authority to dismiss frivolous appeals.[228] The standard on which appeals are dismissed for frivolousness is broader than that used to assess common-law monetary sanctions. Thus, appellate courts have dismissed appeals not only when they found the appeal undertaken for delay, oppression, vexation or in bad faith, but also when the court determined that the appeal was meritless.[229] Generally, dismissals of frivolous appeals have been granted on motion by the appellee.[230]

The American Rule limitations (and its exceptions) do not apply when the courts are given statutory authority to award attorneys fees. Oklahoma has provided such statutory authority in connection with

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opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reason."). This standard is subjective, permitting analysis of the motives and intent of the sanctioned litigant. Contrast the objective standard under the Federal Rules of Appellate Procedure, U.S. Industries, Inc. v. Touche, Ross & Co., 854 F.2d 1223, 1244 (10th Cir. 1988) (using objective standard to impose sanctions under FED. R. APP. P. 38), and Oklahoma statutes permitting the imposition of appellate sanctions. TRW/REDA Pump v. Brewington, 829 P.2d 15, 23 (Okla. 1992) (using objective standard to impose sanctions under [OKLA. STAT. ANN. tit. 20, § 15.1 (West 1988 & Supp. 1993]).

228. Strode v. Abshire, 283 P.2d 842, 843 (Okla. 1955) (granting motion to dismiss appeal on grounds that appeal "frivolous and without serious merit" where the only issue presented was the prejudice of the judge at the trial court level and the petition was filed late); Edmonds v. White, 225 P.2d 359 (Okla. 1950 (holding that a motion to dismiss appeal on grounds that the appeal was without merit and for delay will only be granted where the appellant failed to abide the judgment of the Supreme Court on remand to the trial court); Christner v. Christner, 224 P.2d 594 (Okla. 1950) (granting motion to dismiss appeal on frivolousness grounds where the appellant appealed from the effects of a prior judgment which became res judicata in the case at bar). *See also* Scaggs v. Barker, 256 P.2d 428 (Okla. 1953) (dismissing as frivolous appeal on supersedeas bond where court found no meritorious defense at trial or appellate level); Whelchel v. Hembree, 205 P.2d 279 (Okla. 1949); Skirvin v. Goldstein, 137 P. 1176, 1177 (Okla. 1914) (dismissing appeal on frivolousness grounds where only error assessed went to sufficiency of evidence).

229. *See* Baker v. Marcus, 228 P.2d 633 (Okla. 1951) (holding appeal was without merit where cursory examination of record, motion to dismiss, and brief presented no grounds for appeal); Edmonds v. White, 225 P.2d 359 (Okla. 1950) (finding appeal meritless and only for delay where appellant failed to abide Supreme Court's judgment remand); Christner v. Christner, 224 P.2d 594 (Okla. 1950) (precluding issues on appeal because of prior final judgment and meritless appeal filed for delay only); Turk Bros. v. Brewer, 11 P.2d 926, 927-928 (Okla. 1932) (dismissing appeal as frivolous where judgment was on a promissory note); Jordan Furniture Co. v. Graham, 10 P.2d 394, 396 (Okla. 1932) (dismissing breach of employment contract appeal as frivolous); Skirvin v. Goldstein, 137 P. 1176, 1177 (Okla. 1914) (dismissing appeal as frivolous where only error raised went to sufficiency of evidence and failure to grant new trial).

230. *See* Strode v. Abshire, 283 P.2d 842 (Okla. 1955) (dismissing appeal); Scaggs v. Barker, 256 P.2d 428 (Okla. 1953) (dismissing as frivolous appeal from judgment on supersedeas bond where no meritorious defense presented at trial or on appeal); Berry v. Crutchmer, 239 P.2d 402, 403 (Okla. 1952) (dismissing appeal of order garnishment because error raised ignored well established law); Christner v. Christner, 224 P.2d 594 (Okla. 1950) (dismissing appeal as frivolous); Whelchel v. Hembree, 205 P.2d 279 (Okla. 1949) (noting it was not court's duty to search for theory supporting and court could dismiss appeal as taken for delay only). *See also* Howe v. Farmers' and Merchants' Bank of Eufaula, 19 P.2d 961 (Okla. 1933) (stating an appeal should be dismissed where it appears from record that appeal is frivolous and for delay only).

frivolous appeals. "On any appeal to the Supreme Court, the prevailing party may petition the court for an additional attorney fee for the cost of the appeal. In the event that the Supreme Court or its designee finds that the appeal is without merit, any additional fee may be taxed as costs."[231] As the statute makes clear, the only monetary sanction the court is permitted to make is the taxing of attorneys' fees.[232] Additionally, the courts must await a petition for fees under the statute in order to impose this sanction, the statute makes no provision for *sua sponte* action by the courts.[233]

The standard for determining whether an appeal is frivolous enough to warrant the imposition of statutory sanctions has been at once both fairly ambiguous and strictly applied.[234] Traditionally, no standard or general rule had been articulated for determining when an appeal lacked "merit."[235] Instead, the older decisions imposed sanctions on a case by case basis and in a conclusory manner. Thus, appeals were characterized as "without merit" when no material fact or issue was in dispute,[236] when no law or theory of law supported the claims made,[237] when the appeal sought a reweighing of evidence which must be accorded substantial deference on appeal,[238] when the

231. OKLA. STAT. ANN. tit. 20, § 15.1 (West 1988 & Supp. 1993). An additional statutory provision for the imposition of sanctions permits the trial court, on motion in certain cases (damages for personal injuries or to personal rights), to assess up to an additional $10,000 in damages for reasonable costs, including attorneys' fees, when it determines that the non-prevailing party acted in bad faith, or failed to ground the claim or defense on existing law, or on a good faith argument for the modification thereof. *Id.* at tit. 23, § 103 (West 1987).

232. *See, e.g.,* Hervey v. American Airlines, 720 P.2d 712, 713 (Okla. 1987); Local Federal Savings v. Burkhalter, 735 P.2d 1202, 1206 (Okla. App. 1987) (holding meritless appeal of summary judgment entitled defending party to attorneys' fees under § 15.1).

233. The result, of course, is that appellees have an incentive to seek imposition of attorneys' fees under OKLA. STAT. ANN. tit. 20, § 15.1 (West 1988 & Supp. 1993) even in marginal cases. Such a motion for attorneys' fees increases the potential cost to the appellant of pursuing appeal and alerts the court that the appeal may be meritless.

234. "[W]e recognize statutes allowing a prevailing party to recover attorney[s'] fees are strictly applied by this Court." TRW/REDA Pump v. Brewington, 829 P.2d 15, 22 (Okla. 1992).

235. *See, e.g.,* Melinder v. Southlands Dev., Inc., 715 P.2d 1341 (Okla. 1985); Goodyear Tire and Rubber Co. v. Pratt, 795 P.2d 115, 116-117 (Okla. App. 1990); Local Federal Savings v. Burkhalter, 735 P.2d 1202, 1205 (Okla. App. 1987).

236. *Burkhalter*, 735 P.2d at 1205. "We agree with Plaintiff that Defendants' arguments constitute an attack on the commercial banking system utilized by the financial institutions of this nation, by the United States Government itself, and by virtually every individual and business in this country. Defendants contend the system is unlawful and, for the most part, is unconstitutional. We hold such arguments to be without merit." *Id.*

237. *Hervey*, 720 P.2d at 712. (Okla. 1987) (characterizing as patently frivolous and vexatious theory that air carrier had legal duty to warn purchasers of air travel vacation packages of weather conditions during time tickets sold).

238. TRW/REDA Pump v. Brewington, 829 P.2d 15, 25-27 (Okla. 1992) (holding appeal is not invitation to reweigh evidence and substitute judgment of appellate court for that of lower court); Goodyear Tire and Rubber Co. v. Pratt, 795 P.2d 115 (Okla. App. 1990) (awarding attorneys' fees for employer's challenge of substantially unreviewable finding of lower court); Tyson

appeal sought review on a theory not presented or preserved below,[239] or when the appeal seeks review on immaterial grounds,[240] or where the appeal sought to ignore well established law.[241] Appeals were also adjudged "meritless" when they fell within the common law exception to the American Rule, and found to be brought in bad faith, vexatiously, wantonly or for oppressive purposes.[242]

With *TRW/REDA Pump v. Brewington* decision,[243] the Oklahoma courts substantially amplified their frivolous appeals jurisprudence, providing a substantial amount of guidance on a generalized level. In crafting this guidance, the Oklahoma Court demonstrated a willingness to borrow significantly from the sanctions jurisprudence of the Federal Rules of Appellate Procedure. An appeal is "meritless" within the meaning of the statute when it has "no reasonable or legitimate legal or factual basis to support it."[244] To determine the meritlessness of an appeal, the court must look to the appeal as a whole to make its determination. Applying an objective test, the court can impose sanctions only "if there are no debateable issues upon which reasonable minds might differ and the appeal is so totally devoid of merit that there is no reasonable possibility of reversal."[245] The court emphasized that the standard enunciated for punishing meritless appeals was not the same as the standard for imposing common law sanctions under the exception to the American Rule.[246]

The *TRW/REDA Pump* Court explained that the the purpose of

Foods, Inc. v. Guthrie, 773 P.2d 769, 771 (Okla. App. 1989) (dismissing as frivolous appeal based on sufficiency of evidence); Thompson v. Duke Const. Co., 681 P.2d 1125, 1127 (Okla. App. 1984) (stating factual determinations of Worker's Compensation Court could not be disturbed when supported by competent evidence).

239. *TRW/REDA Pump*, 829 P.2d at 24-25.

240. Thompson v. Duke Const. Co., 681 P.2d 1125, 1127 (Okla. App. 1984) (holding immaterial appellant's contention that order of trial court was "vague and uncertain" for requiring reimbursement to claimant for extra pair of work boots).

241. *TRW/REDA Pump*, 829 P.2d at 27-28. ("TRW cannot simply ignore the law without the probability a determination will be made that arguments which do ignore well established law will be deemed patently frivolous.").

242. *See, e.g.*, Hervey v. American Airlines, 720 P.2d 712, 713 (Okla. 1986) (holding appeal vexatious, frivolous, and wholly without merit); Melinder v. Southlands Dev., Inc., 715 P.2d 1341 (Okla. 1985) (holding appeal brought in bad faith and for oppressive purposes only).

243. 829 P.2d 15, 22 (Okla. 1992).

244. *Id.* at 22.

245. *Id.* at 23.

246. "We note [OKLA. STAT. ANN. tit. 20, § 15.1 (West 1988 & Supp. 1993)] as it concerns the allowance of appellate attorney fees *is not* coextensive with the bad faith or oppressive conduct exception to the American Rule found in cases like City National Bank and Trust Co. v. Owens, 565 P.2d 4 (Okla. 1977), although there may often be overlap between the statutory basis for an award under § 15.1 and the common law exception found in *Owens*." *TRW/REDA Pump*, 829 P.2d at 23.

this provision is to eliminate appeals which "have no place in the legal or appellate system. Rather than benefitting the public or the judicial system, such appeals merely take valuable resources and time away from those cases having some arguable merit, which should be the ones given detailed study by the appellate bench."[247] But, the real cost to the appellate courts may be the time devoted to responding to an increasing number of sanctions motions for the filing of allegedly frivolous appeals, most of which will (ought to be) denied.[248] Such sanctions, even when imposed, are generally imposed on the litigant. To the extent the attorney could be punished, it would be perhaps in an action for malpractice, and for violation of the rules of professional conduct.[249]

247. TRW/REDA Pump v. Brewington, 829 P.2d 15, 23 (Okla. 1992). In this respect, the courts have clearly identified a significant cost in terms of judicial resources of liberal anti-finality rules, such as those which create incentives to appeal trial court determinations, especially those that appellate courts would not consider worth their time or trouble. This attitude mirrors the attention of some commentators. *See, e.g,* RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-166, 317-320 (1985) (asserting quantity endangers quality of federal justice); Michael Vitiello, *The Appellate Lawyer's Role in the Caseload Crisis*, 58 MISS. L.J. 437, 470-479 (1988) (urging lawyers to more actively police themselves); Howard, *Query: Are Heavy Caseloads Changing the Nature of Appellate Justice?* 66 JUDICATURE 57 (1987); John A. Martin & Elizabeth A. Prescott, *The Magnitude and Sources of Delay in Ten State Appellate Courts*, 6 JUST. SYS. J. 305 (1981) (arguing for strict rule enforcement and case management on theory that court organization and process more important than volume in explaining delays). On the other hand, appellate court judges already minimize the risk of poor judicial resource use by summarily disposing cases deemed meritless. Even the real judicial cost of diversion of support personnel may be minimal. The same courts that exhort the bar against the evils of frivolous appeals make clear that such appeals, at least those egregious enough to warrant sanctions, are fairly rare. *See, e.g., TRW/REDA Pump*, at 22-23.

248. Courts and commentators have noted the increasing burden of this type of ancillary motion practice in appeals. *See, e.g.,* J. Michael Medina, *Ethical Issues in Appellate Litigation—A Survey*, *in* 1 OKLAHOMA APPELLATE PRACTICE AND PROCEDURE: PRACTICE IN THE OKLAHOMA AND TENTH CIRCUIT APPELLATE SYSTEMS 5 (sponsored by Oklahoma Bar Association and the University of Oklahoma College of Law Continuing Legal Education Department) (Spring 1993); William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985) (fearing increasing ancillary FED.R.CIV.P. 11 litigation); *cf.* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1955-1962 (1989) (FED. R. CIV. P. 11 context). To the extent that the courts increase the possibility that an opponent will be sanctioned for filing a losing appeal, the courts increase a cost (or the risk) of appeal. Such a risk (and its inherent costs) can be approximated and applied to determine the value of pursuing appellate remedies. The cost to the judgment winner of the bringing of an appeal may be greater than the additional cost that sanctions hold for those who bring the appeal.

249. OKLA. STAT. ANN. tit. 5, ch. 1, App. 3-A, Rule 3.1 (West 1984 & Supp. 1993) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. . . "); State v. Elrod, 780 P.2d 696 (Okla. 1989) (suspending a lawyer for 90 days for failing to reveal that lawsuit was groundless). *See* DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE, § 15.4 (1980); Ronald E. Mallen, *The Litigation Attorney—Areas of Liability in* PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION 22, 27 (A.B.A. Section on Insurance, Negligence and Compensation Law 1977); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1992) ("A lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is

2. House Bill 1468 Changes

House Bill 1468 does not change prior law respecting a court's response to frivolous appeals. Rather, it has added a new statutory basis for the imposition of appellate sanctions.[250] The Committee Comments to new Section 995 indicate that the statute is modeled after Rule 38 of the Federal Rules of Appellate Procedure,[251] and that the new statute is consistent with current Oklahoma law.[252] The most significant impact of the new legislation should be to expand the reach of the sanctioning powers of the appellate courts and the flexibility of the courts to assess sanctions, permitting the imposition of such sanctions in appropriate cases,[253] where under old law the courts might

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a basis for doing so that is not frivolous."); MODEL RULE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980). Other states following the MODEL RULES OF PROFESSIONAL CONDUCT have imposed a variety of sanctions on lawyers interposing frivolous actions. *See, e.g.,* People v. Kane, 655 P.2d 390 (Colo. 1982) (3 year suspension); *In re* Jafree, 444 N.E. 2d 143 (Ill. 1982) (disbarment for bringing more than 40 frivolous and defamatory suits); *In re* Paauwe, 654 P.2d 1117 (Or. 1982) (30 day suspension); *In re* Cairo, 338 N.W. 2d 703 (Wis. 1983) (revocation of license for bringing frivolous action); *In re* Lauer, 324 N.W. 2d 432 (1982) (reprimand for advancing unwarranted claim).

250. House Bill 1468, § 24, *adding* OKLA. STAT. tit. 12, § 995.

251. FED. R. APP. P. 38 provides: "[I]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." The Committee comments to the rule indicates that the finding of frivolousness under the rule does not depend on a showing that the appeal resulted in delay, and that "damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant." FED. R. APP. P. 38 (Notes of Advisory Committee on Appellate Rules, 1967 Adoption).

252. The Committee comments are quite instructive and are reproduced in full here:

> This Section is derived from Federal Rule of Appellate Procedure 38, and it is consistent with prior Oklahoma law authorizing the dismissal of frivolous appeals. Berry v. Crutchmer, 205 Okla. 528, 239 P.2d 402 (1950) ("[W]here a motion to dismiss has been filed on the ground that the appeal is . . . without merit such appeal will be dismissed."); Tulsa Defense Houses, Inc. v. Copeland, 206 Okla. 581, 243 P.2d 696 (1950). This Section reinforces the authority of appellate courts to dismiss frivolous appeals and also provide appellate courts with authority to impose sanctions for frivolous appeals. *See also* Okla. Stat. tit. 20, § 15.1 (1991) (authorizing an appellate court that finds an appeal to be without merit to tax an additional fee as costs). Like trial courts, appellate courts should exercise restraint in imposing sanctions in order not to chill the adversary process. Sanctions should not be imposed on account of an honest mistake or where an appeal is filed and prosecuted in good faith. Sanctions may be appropriate where an appeal is filed solely for delay or for the purpose of disrupting proceedings in the trial court. The last sentence is intended to make it clear that the same remedies of dismissal and imposition of sanctions are available for the filing of frivolous cross-appeals and original proceedings in the appellate courts as are available for the filing of frivolous appeals.

House Bill 1468, § 24, *codified as* OKLA. STAT. tit. 12, § 995 (Committee Comments) (manuscript, on file with the author).

253. "[A]s a matter of justice to the appellee and as a penalty against the appellant." FED. R. APP. P. 38 (Notes of Advisory Committee on Appellate Rules, 1967 Adoption). *See* Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845 (suggesting a standard for imposition of sanctions under FED. R. APP. P. 38 and a revision of the rule). Like

have been unable to reach.[254]

First, to the extent that Oklahoma courts choose to import federal case law interpreting FED. R. APP. P. 38 to interpret new section 995, the standard for determining frivolousness may be relaxed, at least a bit. The Committee comments to section 995 encourage the use of federal case law for purposes of interpretation. The federal rule of frivolous appeals has been extensively considered by the federal courts. While there exists some inconsistencies in the application of FED. R. APP. P. 38 between the circuits,[255] some general patterns have emerged. Under the federal rules, an appeal is deemed frivolous if the result is obvious or the arguments of error are wholly without merit.[256] A federal court in Oklahoma has held that the test for determining whether an action is frivolous is whether the plaintiff can make a rational argument on the law or the facts to support his claim.[257] FED. R. APP. P. 38 has been applied in a variety of contexts, especially in the First, Seventh and Ninth Circuits. Examples of meritless appeals or appeals with obvious results include claims precluded by principles of claim preclusion,[258] by the running of the statute of limitations,[259] claims which in the appellate court's opinion, quibbled

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the Oklahoma courts, the federal courts determine appropriateness by reference to the wastefulness (of time and resources) of conduct sought to be sanctioned. *See* Asberry v. United States Postal Service, 692 F.2d 1378, 1382 (Fed. 1982) (stating frivolous appeals waste taxpayer money, diminish opportunity for careful consideration of meritorious appeals, and delay access to courts); TRW/REDA Pump v. Brewington, 829 P.2d 15, 23 (Okla. 1992).

254. *See* House Bill 1468, § 24, *codified as* OKLA. STAT. tit. 12, § 995 (Committee Comments) (manuscript, on file with the author), reproduced above at note 252.

255. For an early discussion of the different approaches to sanctions taken by the federal courts of appeals, see Robert J. Martineau and Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 AM. U. L. REV. 603 (1985).

256. *See, e.g.*, Autorama Corps. v. Stewart, 802 F.2d 1284, 1287-88 (10th Cir. 1986) (considering sanctions both under the bad faith exception to the American Rule and the federal appellate rules and noting the standards are are different); FDIC v. Van Laanen, 769 F.2d 666, 667 (10th Cir. 1985) (dismissing as frivolous appeal where result was obvious or arguments of error wholly without merit). Federal and state courts have held that they have the inherent power to impose sanctions on litigants and their attorneys as a consequence of their authority to regulate their docket, promote judicial efficiency, and control against the filing of frivolous appeals. *See, e.g.*, Clark v. Commissioner of Internal Revenue, 744 F.2d 1447, 1448 (10th Cir. 1984) (holding claim legally frivolous because arguments were timeworn and were advanced in spite of well established law). In this respect, the federal standard for the determination of the frivolousness of an appeal is substantially similar to the standard traditionally enunciated in Oklahoma.

257. *See, e.g.*, Davis v. Oklahoma Department of Corrections, 516 F.Supp. 5, 7 (W.D.Okla. 1980) (dismissing as frivolous prisoner's action for damages for injuries resulting from ingestion of substance smuggled into prison because court determined prisoner could not make a rational, supporting argument on law or facts).

258. Garza v. Westergren, 908 F.2d 27 (5th Cir. 1990); Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1332 (9th Cir. 1981).

259. Casagrande v. Agoritsas, 748 F.2d 47, 49 (1st Cir. 1984); McConnell v. Crithlow, 661 F.2d 116, 118 (9th Cir. 1981) (failing to omit individual defendants against whom claims barred by statute of limitations).

too much with the trial court findings, especially findings of fact,[260] or where a litigant's brief misrepresented facts or the law.[261] However, the federal courts have refused to construct any *per se* rules respecting what may constitute a frivolous appeal. Imposition of such rules might tend to cause too great a chill on advocacy.[262] The federal courts have also looked to the evolving standards of Rule 11 for guidance with respect to the appropriate sanctions for a frivolous appeal.[263]

Second, new section 995 may permit the appellate courts to act *sua sponte*.[264] While the language of the new statute does not explicitly provide for *sua sponte* action, neither does it condition the power to impose additional costs or sanctions on the actions of the parties to the appeal.[265] As such, it is reasonable to assume that, at least in egregious cases, the appellate courts may act without waiting for a party to

260. U.S. v. Santa Fe Eng'rs, Inc., 567 F.2d 860, 861 (9th Cir. 1978).

261. Medina v. Chase Manhattan Bank, 737 F.2d 140, 145 (1st Cir. 1984). *See also* Burlington N. R.R. Co. v. City of Superior, 962 F.2d 1619, 1620 (7th Cir. 1992); Commonwealth Electric Co. v. Woods Hole, 754 F.2d 46, 47-48 (1st Cir. 1985).

262. *See, e.g.*, White v. General Motors, 908 F.2d 669, 674-75 (10th Cir. 1990) (explaining that an appeal is not necessarily frivolous *per se* simply because the presentation of the issues in the district court was bad enough to be sanctionable). The federal court's reticence in this regard is in accord with the intent of the Legislature in enacting OKLA. STAT. tit. 12, § 995, to "exercise restraint in imposing sanctions in order not to chill the adversary process." House Bill 1468, § 24, *codified as* OKLA. STAT. tit. 12, § 995 (Committee Comments), reproduced above at note 252. It is also in accord with the results reached by courts in other states. *See, e.g.*, Bowman v. Fire Investigations & Analyses, Inc., 502 So.2d 773, 775 (Ala. 1987) (explaining standard of frivolousness is not defined by the Rule but is determined by the court, and court prefers dismissals on merits).

263. *See, e.g.*, Mullen v. Household Bank-Federal Sav. Bank, 867 F.2d 586, 588 (10th Cir. 1989) (determining that a court may look to the principles that have evolved in the interpretation of Rule 11 in assessing the amount of the sanction awarded pursuant to FED. R. CIV. P. 38 and 28 U.S.C. § 1912). 28 U.S.C. § 1912 (1988) provides that "where a judgment is affirmed by the Supreme Court or the Court of Appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay and single or double costs." For discussion of evolving case-law under FED. R. CIV. P. 11, see GREGORY JOSEPH, SANCTIONS AND THE FEDERAL LAW OF LITIGATION ABUSE (1989); GEORGENE VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES (1991); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989); William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988). Some states have also adopted the flexible approach of Fed. R. Civ. P. 11. *See* TEN. CODE ANN. § 27-9-114(b)(3) (1992) ("In any appeal pursuant to this section deemed by the court to be frivolous, the sanctions of the Federal Rules of Civil Procedure, Rule 11 may be applied by the chancellors.").

264. OKLA. STAT. tit. 12, § 995 permits the appellate court to impose sanctions "if it determines that an appeal is frivolous." For the federal analogue, see, United States v. Rayco, Inc., 616 F.2d 462 (10th Cir. 1980) (award of double costs and attorneys fees apparently on court's own initiative); Searcy v. Houston Lighting & Power Co., 907 F.2d 562 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 438, *reh'g. denied*, 111 S. Ct. 718 (on *pro se* appeal).

265. However, the specific limitations of other Oklahoma statutes, some of which provides for the taxation of costs only on petition of the prevailing party. OKLA. STAT. ANN. tit. 20, § 15.1 (West 1991 & Supp. 1993)

move for sanctions or dismissal of the appeal. The courts of other states have the power to impose sanctions *sua sponte* for frivolous appeals.[266]

Third, new section 995 may also expand the court's discretionary power to impose sanctions against parties. New section 995 specifically permits the appellate court to impose sanctions on "the appellant, the appellant's attorney, or both."[267] Under existing law, courts have generally imposed sanctions for frivolous appeals on the litigants.[268] While the court retained inherent authority to discipline attorneys for pursuing frivolous appeals as a breach of the Rules of Professional conduct,[269] statutory sanctions were routinely imposed on appellants. The new statute reinforces the power of the court to

266. *See, e.g., In re* Marriage of Flaherty, 31 Cal. 3d 637, 654 (Cal. 1982) (explaining that penalties for prosecuting frivolous appeals may not be imposed without notice and an opportunity to be heard); Mission Denver Co. v. Pierson, 674 P.2d 363 (Colo. 1984) (holding that sanctions for frivolous appeals cannot be imposed *sua sponte* until appellant is afforded notice and an opportunity to respond); Lowder v. All Star Mills, Inc., 405 S.E.2d 774, 776 (N.C. Ct. App. 1991) (notifying appellant to show cause why sanctions should not be imposed after appellant brought more than 20 appeals in one case); S.C. CODE RULES OF APPELLATE PRAC. Rule 240 (1991) (allowing court to impose sanctions on its own motion after notice for frivolous appeal).

267. House Bill 1468, *to be codified as* OKLA. STAT. ANN. tit. 12, § 995. The Oklahoma statute, at least in this regard, is broader than the analogous power of the courts under FED. R. APP. P. 38. The federal rule extends only to parties. The federal courts, however, have imposed costs on attorneys who unreasonably and vexatiously "multiply the proceedings." 28 U.S.C. § 1927 (1988 & Supp. 1993). *See* Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 AM. U. L. REV. 603 (1985). For federal cases construing FED. R. APP. P. 38 and 28 U.S.C. § 1927 to permit sanctioning both litigants and counsel, see, e.g., Romala Corp. v. United States 927 F.2d 1219 (Fed. Cir. 1991); Kellerman v. United States, 871 F.2d 1363 (8th Cir. 1989), *cert. denied*, 490 U.S. 1109 (1989); N.C.N.B. Nat'l Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1987); McConnell v. Critchlow, 661 F.2d 116 (9th Cir. 1981). In addition, the federal courts have inherent authority to sanction counsel. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

268. *See, e.g.,* Melinder v. Southlands Dev., Inc., 715 P.2d 1341 (Okla. 1985) (taxing as costs attorneys' fees in favor of appellee); Best v. State, 736 P.2d 171 (Okla. Ct. App. 1987) (holding costs may be awarded against party bringing frivolous appeal).

269. OKLA. STAT. ANN. tit. 5, ch. 1, App. 3-A, Rule 3.1 (West 1984 & Supp. 1993). *See* State v. Elrod, 780 P.2d 696 (Okla. 1989) (imposing 90 day suspension on lawyers for failing to reveal groundlessness of lawsuit); J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. U. L. REV. 677, 681-84 (1989); MODEL RULES OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2)(1980) (imposing a subjective test for compliance with rule; lawyer may not knowingly advance a claim unwarranted by existing law, unless good faith argument can be made for extension, modification, or reversing existing law); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 and comment (1983) (imposing objective test); 1 G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 329-35 (1985). Other jurisdictions also sanction attorneys for violations of state professional responsibility rules for filing frivolous appeals. *See, e.g.,* In re Matter of Wade, 814 P.2d 753 (Ariz. 1991); In re Cook, 526 N.E.2d 703 (Ind. 1988) (disbarring attorney in part for bringing appeal in bad faith and to harass and injure opponent). The federal courts have also sanctioned attorneys for violations of state professional responsibility rules. *See* United States v. Collins, 920 F.2d 619, 626-27 (10th Cir. 1990) (interpreting Oklahoma rules of professional conduct and revoking *pro haec vice* admission to practice before court for filing frivolous suit).

tailor the sanction imposed for a frivolous appeal to the parties deemed most at fault.[270] For example, the Seventh Circuit has used its sanctioning authority to impose liability on counsel where counsel is determined to be the real moving force behind the frivolous action, or where the frivolous contention is one that only a lawyer would be expected to know.[271] While the theoretical power of the Oklahoma appellate courts may not be significantly expanded, the practical effect of the statute should give the courts more impetus to use their inherent and traditional powers in this respect.

Fourth, the new law may expand the power of the courts to determine the amount and nature of the sanctions imposed on appellant or appellant's counsel. While both the new statute and title 20, section 15.1 speak of attorneys' fees as costs which may be taxed to the parties interposing a frivolous appeal,[272] the new law makes clear that sanctions may include, but need not be limited to attorneys fees. Appellate courts may now feel more free to impose monetary penalties in an amount more closely related to the cause of the frivolousness of the appeal and the likelihood of deterrence, and not merely tax attorneys' fees as costs. The new statute makes clear that punitive sanctions may be assessed in appropriate cases, especially where the interposing of the frivolous appeal may have increased the damages suffered by appellee. In this respect, the Oklahoma courts may follow the lead of the Tenth Circuit[273] and look to the rules which have been evolving respecting the imposition of sanctions under FED. R. CIV. P. 11, as well as under FED. R. APP. P. 38.[274]

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270. This power to tailer the object of the sanctions imposed is also in accord with the sanctioning power of the federal courts under FED. R. CIV. P. 11 and FED. R. APP. P. 38. *See, e.g.*, William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 200-04 (1985). Judge Schwarzer notes in interpreting the sanctioning power under Fed. R. Civ. P. 11:

> In assessing fees, a determination must also be made who is to pay them. Where the violation is primarily a professional dereliction, it is appropriate to impose the sanctions on the attorney and prohibit reimbursement by the client. Where, on the other hand, the violation may reflect deliberate litigation strategy, at least some part of the sanctions can fairly be imposed on the client. . . .

Id. at 203.

271. Reid v. United States, 715 F.2d 1148 (7th Cir. 1983); Thorton v. Wahl, 787 F.2d 1151 (7th Cir. 1986); Maneikis v. Jordan, 678 F.2d 720 (7th Cir. 1982) (imposing sanctions because of dereliction too technical for client to understand). *See generally* Linda R. Hirshman, *Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 CHI.-KENT L. REV. 191, 204-05 (1987).

272. OKLA. STAT. ANN. tit. 20, § 15.1 (West 1991 & Supp. 1993) and discussion above at note 268.

273. Mullen v. Household Bank-Federal Savings Bank, 867 F.2d 586, 589 (10th Cir. 1989).

274. William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985). *See* Mark S. Stein, *Of Impure Hearts and Empty Heads: A Hierarchy of Rule*

Fifth, the statute also appears to empower the court to rid itself of frivolous appeals in a manner somewhat broader than under prior law. Appellate courts generally dispose of appeals by opinion. Frivolous appeals can be disposed of by summary opinion.[275] However, frivolous appeals can be dismissed on motion, if the court determines that the appeal was frivolous and for delay only.[276] By permitting the appellate court to dismiss the appeal, the new statute may serve to encourage appellate courts to dismiss frivolous appeals cases, even where the standard of "solely for delay" might not have been met. Nor should the court be required to wait to entertain a motion to dismiss before it can dismiss a patently frivolous appeal. In this respect, the new law represents a codification with some expansion of the powers of the court to dispose of frivolous appeals.

At a minimum, then, new Section 995 should provide the appellate courts with a substantial amount of flexibility in determining the "costs" of frivolous appeals, a flexibility is unavailable under current common-law or statutory rules. Flexibility means departing from the all-or-nothing conception of frivolousness built into case law and statutory conceptions of that term. Appeals need not be classified as frivolous or not frivolous, the former meriting a severe penalty, the later nothing. There exists a more subtle range of frivolousness which ought to form the basis of a more sophisticated approach to appellate sanctions, an approach encouraged by the new provision. This expansive reading of the new statutory authority, however, may be problematic, an issue I take up in Part III in the context of the search for consensus on the cost of appeal, and more generally on the utility of appellate review and the value of (cost of defending) particular substantive rights.

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11 Violations, 31 SANTA CLARA L. REV. 393 (1991) (defining a hierarchy of perniciousness of violations of Rule 11 and arguing that several of these are unnecessary); Edward D. Cavanaugh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L.REV. 499 (1986) (analyzing emerging Fed. R. Civ. P. 11 case law); Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 B.Y.U. L. REV. 959 (analyzing the shift by state courts to regulation based on Fed. R. Civ. P. 11); Note, *A Uniform Methodology For Assessing Rule 11 Sanctions: A Means to Serve the End of Conserving Public and Private Resources*, 63 S.CAL. L. REV. 1855 (1990).

275. The summary affirmance rules are set forth at OKLA. STAT. ANN. tit.12, ch. 15, Rule 1.202 (West 1988).

276. Whelchel v. Hembree, 205 P.2d 279 (Okla. 1949) (noting it was not the court's duty to search for a theory supporting the appeal and that it could dismiss appeal as taken for delay only); Scaggs v. Barker, 256 P.2d 428 (Okla. 1953); Skirvin v. Goldstein, 137 P. 1176, 1177 (Okla. 1914). *See also* Howe v. Farmers' and Merchants' Bank of Eufaula, 19 P.2d 961 (Okla. 1933) (explaining that an appeal that appears, from an examination of the record, frivolous and for delay only should be dismissed).

III. Consensus, Complexity and House Bill 1468's Changes

The rules of supersedeas and frivolous appeals evidence the general consensus on the deference due lower court determinations.[277] House Bill 1468's changes indicate a modification of that consensus in a variety of little ways. By little, I mean that the general consensus respecting the availability of appeal has not changed, but the utility of appealing certain types of actions is now perceived to be less useful (and consequently is more costly). A greater complexity results from this lack of uniformity respecting the deference to be given lower court determinations. The cost of appeal, that is, the practical manifestation of the deference accorded trial court decisions, is increasingly a function of the nature of the dispute, the basis on which review is sought, and the manner in which an appeal is made. I explore this new complexity in this Part III. In Part IV, I attempt a preliminary exploration of the more fundamental questions raised by the manipulation of the of supersedeas and frivolous appeals which drive the persistent search by Oklahoma (and other states) for refinement of the rules of civil appellate procedure and by which our choices of "refinements" are limited.

A. *Suspensions of Judgments*

The amendments to the effectiveness of judgments rules in Oklahoma have brought clarity, and perhaps a measure of certainty as well. The vagaries of case law and its mutability in the face of future precedent have been mitigated, at least to the extent that the courts cannot (absent a finding of constitutional defect) repudiate statutory law as easily as they might repudiate precedent. But the clarity and certainty the statutory amendments have effected have not substantially changed the state's approach to the suspension of the effectiveness of judgments. Perhaps this is a good thing; there may be nothing wrong with the current approach, especially if it reflects a consensus among lawyers, judges and legislators.[278] Let's explore the ramifications of the new rules in the context of the ease (or difficulty) of reviewing lower court determinations.

277. *See* previous discussion in paper, Part I., *Supersedeas, Frivolousness and the Perceived Utility of Appeal.*

278. This, of course, depends on the extent to which procedural rules reflect value judgments about disputes, their resolution and the overall value (to society and the litigants, especially) of finality and effectiveness of lower court judgments. As the practical manifestation of value judgments, such rules are not immutable; nor does there exist a combination of such rules which

1. The Price of Reform

Oklahoma's "clear" and "certain" new law of suspension of judgments remains complex. Although the statutes reduce the reliance of the bar on lore and the esoterica of experience by codifying many of the understandings and practices under old law, the statutes have not simplified the system for suspending judgments in the context of civil appellate procedure. Judgments are final (for purposes of appeal) and effective and amenable to post-trial motions upon the filing of a written judgment, but not always. Sometimes judgments are effective when rendered, but not final for purposes of appeal until a written judgment is filed. Likewise, judgments are automatically stayed for ten days after the filing of the written judgment, but not always; some judgments may be conditionally stayed automatically, others may not be stayed automatically at all, absent action by the court during the ten day period and beyond. All judgments of certain types are subject to stays as of right from the time a written judgment is filed, but this does not apply to judgments in other proceedings, in which case, the right to suspend effectiveness is not only discretionary, but arises at the time of the rendition of the judgment. Additionally, a variety of specialty statutes govern the suspension of judgments in a number of other contexts. Added to this are the peculiarities of stay practice in particular courts, which may have a substantial impact on the customs surrounding approaches to approval of undertakings and sureties, and for the understanding of what might constitute necessary conditions for the discretionary suspension of judgments.

Indeed, in one area in particular, the new law adds a complexity to the prior law worth emphasizing. The major undertaking of the amendments to the rules of civil appellate procedure was to bring certainty to the determination of the giving of judgments and to have the timing of a judgment's appealability and effectiveness start at the same time.[279] One of the criticisms of prior law was that it separated

might bring procedural perfection. As values change about the nature of access to dispute resolution devices provided by the state to litigants, the worthiness of disputes (that is, the value to the state of providing a means of resolving them) and courts, so too will the process for resolving such disputes be transformed. Professor Resnick nicely describes the array of values and procedural choices currently jostling for preeminence in American jurisprudence. *See* Judith Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 845-70 (1984) (identifying 12 of what the author describes as "valued features" which underlie American approaches to civil procedure).

279. "The primary purpose of the Judgments Act was to change the date of finality for judgments from the date of the judge's oral pronouncement of the decision to the date of filing of a written judgment with the court clerk." House Bill 1468, § 9, *adding* OKLA. STAT. tit. 12, § 696.2 (Committee Comment). *See* Charles W. Adams & J. Michael Medina, *Recent Developments in Oklahoma Civil Appellate Procedure*, 26 TULSA L.J. 489, 491-95 (1991).

the timing of initial effectiveness, for purposes of execution, from initial finality, for purposes of appeal.[280] House Bill 1468 attempts to tie finality and effectiveness to one event—the filing of the judgment.[281] However, a large group of proceedings are exempted from these simplifying rules.[282] For those exempted proceedings, the time within which to commence an appeal begins with the filing of a judgment. However, the time for the effectiveness of such judgments begins at the time the judgment is "pronounced by the court."[283] Presumably, the time for filing a motion for new trial under section 653, as amended, and the time for filing post trial motions under new section 990.2 also begin to run from the time of the filing of the judgment in those cases; however, that is not entirely clear.[284] The results, in any case, create new traps for unwary litigants who either fail to anticipate the immediacy of the effectiveness of a judgment or fail to anticipate

280. *See* Adams & Medina, *supra* note 279, at 494-95. Thus, OKLA. STAT. ANN. tit. 12, § 990A(A) (West Supp. 1993) provides for the commencement of appeal "within thirty (30) days from the date the final order or judgment is filed." *See* Harvey D. Ellis, Jr., *The 1991 Repeal of the 1990 Judgments and Appeals Act*, 62 OKLA. B.J. 2793, 2794 (1991). The time for filing post-trial motions, however, remains tied to the time of rendition. OKLA. STAT. ANN. tit. 12, §§ 653, 698 (West 1988 & Supp. 1993). A judgment's effectiveness is also tied to rendition. Wilks v. Wilks, 632 P.2d 759, 761-762 (Okla. 1981).

281. House Bill 1468, § 8, *amending* OKLA. STAT. ANN. tit. 12, § 653 (West 1988 & Supp. 1993) (stating that the ten day period for filing a motion for new trial commences on the filing of the judgment); *id.* § 9, *adding* OKLA. STAT. tit. 12, § 696.2(C) (filing of judgment is jurisdictional prerequisite for appeal) and 696.2(D) (noting judgment ineffective until filed); *id.* § 19, *adding* OKLA. STAT. tit. 12, § 990.2 (period to file post trial motions which stay the period for filing appeals determined by reference to filing date of judgment).

282. House Bill 1468, § 9, *adding* OKLA. STAT. tit. 12, § 696.2(D) (listing the following actions: divorce, separate maintenance, annulment, post-decree matrimonial proceedings, paternity, custody, adoption, termination of parental rights, mental health, guardianship, juvenile matters, habeas corpus proceedings, proceedings for temporary restraining orders, temporary injunctions, permanent injunctions, conservatorship, probate proceedings, special execution in foreclosure actions, quiet title actions, partition proceedings or contempt citations). A number of policy reasons have been advanced to support this exemption. At least with respect to the family law proceedings subject to the exemption, the rationale rests on case law. *See, e.g.*, Cochran v. Rambo, 484 P.2d 500, 501 (Okla. 1971) (using public policy to vest the court with power to provide and care for minor children in connection with divorce proceedings).

283. House Bill 1468, § 9, *adding* OKLA. STAT. tit. 12, § 696.2(D). In effect, for this group of proceedings, and for purposes of effectiveness, *but not finality*, the old rules and confusions respecting the actual timing of pronouncements of judgments continue to apply. *See, e.g.*, Grant Square Bank & Trust Co. v. Werner, 782 P.2d 109, 111 (Okla. 1989) (holding that pronouncement was effective); Carr v. Braswell, 772 P.2d 915, 917 (Okla. 1989) (stating that order was pronounced at time it "was pronounced from the bench and communicated to the parties"); Arkansas Louisiana Gas Co. v. McBroom, 526 P.2d 509, 511 (Okla. 1974) (pronouncing order at time of jury verdict).

284. House Bill 1468, § 9, *adding* OKLA. STAT. tit. 12, § 696.2(D) speaks only of the time for appeal running from the time of the filing of the judgment. However, the exception carved by this section appears only to be aimed at accelerating the effectiveness of the judgments specified. Consequently, in all other respects, such judgments should be treated like all other judgments under the modified rules. Of course, the other major exception from the generally applicable new rules involves the ability to obtain stays of judgments rendered in the specified proceedings.

the start and end of the time permitted for filing post-trial motions or appeals. This, obviously, does not simplify appellate procedure. More importantly, it shifts the cost of judgments more effectively to judgment losers, who are faced with an accelerated effectiveness of judgments, a presumption against staying such judgments, and potential delay (at least relative to the time of the effectiveness of the judgment) in commencing an appeal from the judgment.[285]

Other potential new difficulties exist as well. House Bill 1468 may have created another (inadvertent) anomaly between the judgment lien provisions and the provisions relating to the effectiveness of judgments. Additionally, it may have created traps for the unwary as a result of the rendering/filing rift. New OKLA. STAT. tit. 12, section 696.2(D) provides that a judgment is ineffective until filed in accordance with that section, unless the judgment arises from a proceeding identified therein, in which case the judgment is effective when pronounced. The exceptions include most real property actions—special executions in foreclosure actions, quiet title actions and partition proceedings.[286] On the other hand, judgment liens are ineffective if execution is not issued within a year from the date the judgment is rendered.[287] Assuming that section 801 is not deemed amended by implication to provide for ineffectiveness one year after the date the judgment becomes effective, which, in any case is unlikely, a number of problems arise. First, if the time of a judgment's rendering is the same as that of its pronouncement, then, with respect to the actions excepted by the provisions of new section 696.2(D), both the effectiveness and the running of the one year period commence at the same time. This makes sense in light of the language of prior cases.[288] If the courts chose to give different meanings to these terms, then the

285. Recall that under the new scheme, the judgment loser must await the filing of the judgment in order to appeal. The timing of such filing is dependent on the time the trial court provides for the preparation of the written judgment, and the time between preparation of the draft of the judgment and that of the approval of all of the parties and the court to the form of judgment. House Bill 1468, § 9, *adding* OKLA. STAT. tit. 12, § 696.2(A). A judgment winner with an effective judgment and a case with a significant possibility of reversal might now find it expedient to delay the judgment preparation timetable as long as possible, to enjoy the fruits of the litigation longer and to increase the economic pressure on the judgment loser to settle and minimize the cost of the litigation.

286. *See* House Bill 1468, § 9, *adding* OKLA. STAT. tit. 12, § 696.2(D).

287. OKLA. STAT. ANN. tit. 12, § 801 (West 1988). But note that in the event a case is appealed, or subject to proceedings in error, the one year period commences after the resolution of those matters. *Id.*

288. *See, e.g.*, Carr v. Braswell, 772 P.2d 915, 917 (Okla. 1989) (holding that order was judgment-effective when pronounced from the bench and communicated to the parties).

periods will not match and the possibility of overlooking the commencement of one or the other increases significantly (as does the possibility of malpractice liability). But the matching of the commencement of the effectiveness of a judgment and the commencement of the one year period for lien effectiveness applies only to those proceedings constituting an exception to the general rule of new section 696.2(D). For run-of-the-mill cases, including most money judgments, the commencement of the effectiveness of the judgment (and the time after which a judgment lien can be filed) will not be the same as the commencement of the one year lien effectiveness period of section 801. Indeed, in such instances, the effect of the new section might be to significantly shorten the period within which execution must be taken out, in order to preserve the lien, since a judgment may actually be filed a significant period of time after its "rendering." And, of course, the consequences of ignoring these timing rules can be significant.[289]

Moreover, the growing similarity between the requirements for superseding money judgments and for discharging a lien of judgment in money judgment cases presents a variety of traps and opportunities for litigants. The new legislation permits the superseding of money judgments by "depositing cash with the court clerk in the amount of the judgment or order plus an amount that the court determines will cover costs and interests on appeal,"[290] in addition to the usual undertaking required to suspend the effectiveness of a judgment.[291] Liens of judgment can be discharged by deposit of substantially the same sum with the court clerk, along with a statement of purpose for the deposit.[292] In addition, the deposit made in both instances may be modified by the trial court.[293]

289. *E.g.*, Federal Land Bank of Wichita v. Hague, 798 P.2d 641, 643-44 (Okla. Ct. App. 1990) (loss of lien priority).

290. House Bill 1468, § 21, *adding* OKLA. STAT. tit. 12, § 990.4(B)(1)(b).

291. House Bill 1468, § 21, *adding* OKLA. STAT. tit. 12, § 990.4(A).

292. Judgment liens can be discharged by depositing with the court clerk, "cash sufficient to cover the whole amount of the judgment, including interest, costs, and any attorneys fees, together with costs and interest on appeal" and a written statement seeking discharge. House Bill 1468, § 14, *amending* OKLA. STAT. ANN. tit. 12, § 706.2 (West 1988). But, unlike deposits in connection with the suspension of judgments, a judgment debtor cannot deposit U.S. Treasury securities or general obligation bonds of the state of Oklahoma to effectively discharge a judgment lien. OKLA. STAT. tit. 12, § 990.4(B)(1)(b) (new). A judgment debtor must deposit cash. House Bill 1468, § 14, *amending* OKLA. STAT. ANN. tit. 12, § 706.2 (West 1988).

293. OKLA. STAT. tit. 12, § 703.3 (West 1988) (judgment liens) and OKLA. STAT. tit. 12, § 990.4(E) (new) ("The trial court shall have continuing jurisdiction during the pendency of any post-trial motion and appeal to modify any order it has entered regarding security or other conditions in connection with a stay.").

However, discharges of judgment liens and stays of execution are not the same thing, and seeking one will not automatically permit the other. Thus, judgment losers seeking both a stay and a discharge of a judgment lien will have to comply with the requirements of both provisions, the amount deposited being equal to the highest sum required under either statute. Failure to *request* both (if both are sought) or to provide the necessary sureties, undertakings or written statements will result in the potential for the discharge of a judgment lien when the stay of execution is ineffective, or a stay of execution with an ineffective discharge.[294] Judgment winners seeking to increase the amount of the deposit during the pendency of an appeal will also have to exercise care where the deposit has served to suspend the effectiveness of the judgment and discharge the lien of judgment. An increase in the deposit under the judgment lien statute, even if granted, and even if not performed by the judgment debtor should not void the stay of judgment, unless the court specifically orders the increase for purposes of maintaining the discharge and the stay of execution.[295] Consequently, under House Bill 1468's reformations, both judgment winners and losers will have to exercise care in cases where the judgment debtor seeks to stay execution of judgment or discharge the judgment lien, or both.

Is all this really necessary? The overall effect of the modification to the suspension of judgment provisions may be to decrease the incentive to appeal the marginal case. However, for well-off judgment losers in money judgment cases, the incentive might just be the opposite. The new law makes it easier to both stay execution and discharge a judgment lien with a single deposit, and it creates some potential pitfalls for judgment winners seeking to object to either. Moreover,

294. The new language of OKLA. STAT. tit. 12, § 706.3 (West 1988 & Supp. 1993) *as amended* by House Bill 1468, § 15, should not lead to a different result. Certainly, had the Legislature intended to allow for the simultaneous discharge of judgment lien and suspension of judgment, it would have so provided; indeed, the new legislation continues the practice of strictly separating the procedures for the obtainment of discharge and supersedeas. What the modifications have attempted, however, is to reduce the actual cost of obtaining both a discharge of judgment lien and a stay by setting equivalent cash requirements in both cases.

295. Thus, the new language in OKLA. STAT. ANN. tit. 12, § 706.3 (West 1988 & Supp. 1993) should not be interpreted to result in the automatic voiding of a stay of execution under new OKLA. STAT. tit. 12, §§ 990.4(A) & (B), despite the "may enforce" language of the former. Rather, that language makes sense only if meant to express the obvious—that absent a valid stay of execution as permitted by statute, the reimposition of a lien of judgment permits the judgment creditor to enforce the judgment against all of the property of the judgment debtor.

political subdivisions may have fared badly under the new law. Beneficiaries of automatic stays under prior law may now be allowed supersedeas as-of-right cases, but they may no longer have the benefit of automatic stays in proceedings where such was required under prior law—particularly in cases involving injunctive relief. On the other hand, the judgment winners in equitable, real estate and family law proceedings have effectively had the costs of those judgments reduced by making it more difficult to prevent immediate execution of judgments, and splitting the timing of effectiveness from the process of appeal.

The new statutory scheme has certainly changed the balance of costs and risks of judgments as between litigants. Stays as of right minimize the cost of suspending judgment to the appellant and act as an incentive to seek the stay, and thus to engage in activities which give rise to the right to stay the judgment—post-trial motions and appeals. Discretionary stays increase the cost of suspending judgment, by increasing both the risk that the stay will not be granted, and that the conditions to the granting of the stay will be beyond the means of the litigant seeking the stay (or at least substantially more onerous than those which have had to have been paid under the suspension as of right rules). The tendency of prior case law, confirmed in the new statutes, is to favor discretionary stays over stays as of right. In this sense, the value of judgments have increased even as the cost of suspending judgments (and therefore decreasing its value) has risen. And, of course, the cost of staying judgments impacts directly on the value of and therefore the incentive, to appeal the trial court determination.

Discretion also increases risk in the sense that litigants may not count on the application of a rule, especially a procedural rule, with any degree of certainty. Discretion, then, tends to increase unpredictability.[296] And unpredictability may be the most troubling aspect of the nature of procedural rule consensus building of the kind currently

296. Better stated, it increases the perception of the potential for unpredictability. Because it is clear that while discretion makes for uncertainty of result, the quantum of that uncertainty diminishes as the extent of consensus of notions on acceptable and unacceptable actions increases. What the complaining about the deficiencies of discretion may well indicate, therefore, is not so much arbitrariness as the existence of substantial disagreement respecting acceptable and unacceptable procedural conduct, and the utility of certain substantive rights. This complaint is implicit in the writings of both traditionalist critics of discretion, who see in the exercise of discretion courts acting capriciously in accordance with political agendas, see Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (1983), and of non-traditionalists who complain of the use by the courts of procedural devices to effectively limit the ability of litigants to assert certain rights, see Carl

practiced and evidenced by Oklahoma's changes in its appellate procedural rules. Unpredictability of this kind, or at least the perception of the existence of this kind of unpredictability, if doled out in large enough (or erratic enough) doses, may well convey to the risk averse or resource poor that litigation may not be worth the risk.[297]

B. *Frivolous Appeals*

The addition of a new weapon in the fight against "frivolous" appeals invariably affects the calculus of parties contemplating an attempt to seek reversal of a lower court determination. At a minimum, the very passage of such a provision indicates a legislature more willing to impose costs on appeals at the margin. But such a willingness may well raise the costs of all appeals because there is never an assurance that an appeal pressed will not be characterized by a court as marginal, and therefore worthy of sanctions. The extent of the marginalization of potential appeals depends, to some degree, on the manner in which court weild their new powers. However interpreted, by increasing the unpredictability of the application of the rules, the new sanctions provision invariably increases the deference accorded the determination of the lower court, and narrows the real effectiveness of the option to seek review of that determination.

1. The New Sanctioning Power, Traditional Sanctions Jurisprudence, and the Effect of the Federal Rules

Commentators have identified a number of different categories of frivolous appeals; they differ from each other in the quantum of detrimental effect or damage to the opposing party and the functioning of the court.[298] And courts have begun to recognize these categories

Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988/89); Georgene Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988).

297. *Cf.* RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 43-44 (1989); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63-69 (1982) (discussing the disparate impact that changes on the economic incentives to settle have on litigants with different financial resources in the context of the settlement rules of FED. R. CIV. P. 68).

298. *See, e.g.*, J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L.J. 677, 681-684 (1989); J. Michael Medina, *Ethical Issues in Appellate Litigation—A Survey*, 1 OKLAHOMA APPELLATE PRACTICE AND PROCEDURE: PRACTICE IN THE OKLAHOMA AND TENTH CIRCUIT APPELLATE SYSTEMS 2-5 (sponsored by Oklahoma Bar Association and the University of Oklahoma College of Law) (identifying nine categories of frivolous appeals: (i) the issue raised on appeal was not raised or preserved at the trial court level, (ii) the appellate briefing was inadequate as a result of inadvertence or by design, (iii) the appeal seeks to relitigate prior cases, (iv) the appeal merely seeks to challenge the sufficiency of the evidence, (v) the appeal

or indicia of frivolousness as well.[299] Oklahoma courts have, however, for the most part hesitated to impose sanctions on the basis of these categories alone.

TRW/REDA Pump illustrates the increasing recognition by Oklahoma courts of the differences between the various categories of frivolousness, the hesitance with which the courts have imposed sanctions for frivolousness other than in the most egregious cases, and the reluctance with which the courts approach the possibility that sanctions for frivolousness are not limited to dismissal or the imposition of attorneys' fees.[300] But, one can question whether a case such as *TRW/REDA Pump* ought to be read as a policy case. More likely, that case is properly interpreted as a self-conscious exercise in statutory construction giving effect to the limitations inherent in the statutory or common law grant of sanctioning authority. Why? It is clear from the cases that Oklahoma courts recognize that they are without power to award attorneys' fees as a sanction absent specific authority. Second, it is also clear that they have recognized that where the sanctioning authority permits the award of attorneys fees, doubtful cases should

involves review on an abuse of discretion or other deferential standard, (vi) the appellant seeks rehearing or reargument, (vii) the party's brief ignores controlling authority, (viii) the appeal clearly was filed to delay the effectiveness of the judgment below, and (ix) the issue on appeal is illogical, crazy or wild); Linda R. Hirshman, *Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 CHI.-KENT L. REV. 191, 199-207 (1987).

299. *See, e.g.*, TRW/REDA Pump v. Brewington, 829 P.2d 15, 22 (Okla. 1992); Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1578, 1580 (Fed. Cir. 1991) (noting appeals may be frivolous as filed, that is, no arguments exist that are non-frivolous, or frivolous as argued, either of which can provide the basis for sanctions)). *See also* discussion, above, at notes 222, 227, 234, and 238-247.

300. The *TRW/REDA Pump* court identified four different types of conduct which could result in the imposition of sanction for pursuing a meritless appeal. These include (i) the failure to raise the alleged errors in the court below, (ii) appeal on a factual issue when the record is devoid of evidence to support the claimed factual error; (iii) challenging factual findings of the lower courts when there is clearly sufficient evidence to sustain the findings, and (iv) making legal arguments on appeal that ignore clearly established law. *TRW/REDA Pump,* 829 P.2d at 23-31. But on the basis of the traditional conception of the sanctioning power, these criteria were not viewed as independent bases, each standing alone, for the imposition of sanctions. Rather, the court determined that there must exist some combination of these categories of frivolousness to permit a court to arrive at a determination that the appeal is frivolous and sanctions justified. Under the statute construed, this approach may well have had some intuitive appeal: the only sanction permitted under OKLA. STAT. ANN. tit. 20, § 15.1 (West 1988 & Supp. 1993) was attorneys' fees. With a more modulated approach to sanctions under House Bill 1468, § 24, *adding* OKLA. STAT. tit. 12, § 995, each of the "indicators" of frivolousness might itself provide the basis for a finding of a frivolous appeal, meriting sanctions commensurate with the severity of the offense. In the past, Oklahoma courts have found an appeal which merely challenges a factual determination in the trial court may well be frivolous. *See* Goodyear Tire & Rubber Co. v. Pratt, 795 P.2d 115 (Okla. Ct. App. 1990) (holding employer challenged substantially unassailable trial court finding). Oklahoma courts have also sanctioned appeals where the court has determined that the arguments advanced were wholly unsupported by existing law. Hervey v. American Airlines, 720 P.2d 712, 713 (Okla. 1986).

be resolved against sanctions because the sole sanction permitted is a severe one, so that only conduct which takes "valuable resources and time away from cases having some arguable merit," ought to be deterred.[301] But, there exists no policy in Oklahoma which limits sanctions only to appeals the deficiencies of which include some combination of the various categories or sources of frivolousness.[302] Nor is there a need to provide merely one (fairly severe) form of sanction for different conduct which results in a meritless appeal.[303] And, Oklahoma courts have never determined that they are prohibited from imposing sanctions other than attorneys' fees and that, as a general matter, they may never exercise any statutory sanction power where a portion (but not all) of an appeal is frivolous. As a result, current jurisprudence does not preclude a more subtle approach to an interpretation of the new sanctions statute.

This becomes clearer when one considers that the Oklahoma courts *have* said, that it is appropriate to look to federal law for an interpretation of analogous sanctioning authority. The federal courts, in interpreting their sanctioning power under FED. R. APP. P. 38 and FED. R. CIV. P. 11 permit both the assessment of sanctions other than attorneys' fees and the imposition of sanctions even where one or more non-frivolous issues are raised on appeal.[304] The federal courts

301. TRW/REDA Pump v. Brewington, 829 P.2d 15, 22 (Okla. 1992). Thus, the policy the Oklahoma courts seek to further is analogous to that set forth in FED. R. CIV. P. 1 ("The rules are to be construed to secure the just, speedy, and inexpensive determination of every action.").

302. Indeed, the *TRW/REDA Pump* court's discussion of the value of sanctions would indicate that Oklahoma policy would tend to favor an approach which deters frivolous conduct but does not chill the adversary process or the ability of counsel to effectively represent his or her clients. *See TRW/REDA Pump*, 829 P.2d at 22-3. Modulated sanctions are said to serve that purpose, to further the policy of the sanctioning authority of the federal rules "to deter rather than to compensate," FED. R. CIV. P. 11 (Committee Notes, 1993 Amendment). In this sense, at least, modulated sanctions for all kinds of frivolous conduct is more in keeping with Oklahoma policy than is the reservation of significant sanctions for particularly egregious conduct, and is in harmony with current federal sanctions rules, including, especially the rationale behind the amendments to FED. R. CIV. P. 11. *Cf.* Granado v. Comm'r, 792 F.2d 91, 94-95 (7th Cir. 1986) (imposing sanctions for one non-frivolous issue raised among several frivolous ones); Dodd Ins. Serv. v. Royal Ins. Co. of Am., 935 F.2d 1152 (10th Cir. 1991) (stating complaint containing both frivolous and non-frivolous claims can violate Rule 11 and that sanctions should deter undesirable behavior).

303. The only need, perhaps, would be the largely unarticulated one of restricting the power of the courts to sanctions appeals. But, in the face of the statutory mandate, such a construction of the statute might well amount to judicial law making of an unfortunate sort.

304. *See, e.g.*, State Indus., Inc. v. Mor-Flo Indus., Inc., 948 F.2d 1573 (Fed. Cir. 1991) (holding amount of damage award for frivolous appeal is within discretion of appellate court); Finch v. Hughes Aircraft Co., 926 F.2d 1574 (Fed. Cir. 1991) (holding sanctions may be imposed for frivolous argument of nonfrivolous issues); *Granado*, 792 F.2d at 94-5 (holding sanctions may be imposed for frivolous issue appealed with several nonfrivolous ones); In re Bithony, 486 F.2d 319 (1st Cir. 1978) (suspending attorney). Contrast Oklahoma case law under OKLA. STAT. tit. 20

have recognized, in the context of FED. R. CIV. P. 11, that:

> The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities. . . .[305]

As such, there appears to be no absolute need, for purposes of imposing sanctions, to treat an appeal which is meritless because the issue was not raised or preserved below in the same way as a court might treat an appeal clearly interposed solely for delay. Nor is there a need to refrain (for fear of chilling that appellate process) from sanctioning an appeal merely because one of a number of issues raised is not frivolous.[306] Under the new provision, both types of appeals ought to be sanctionable as frivolous on the basis of analogous federal practice. However, the sanctions in each case ought not be the same, the former perhaps subject to significantly lighter sanctions than the latter, and the sanctions ought to apply irrespective of the existence of an arguably non-frivolous portion of the appeal.[307] In the same manner, the courts ought to be free to target sanctions on the more culpable party—either the litigant or the litigant's counsel.

The Oklahoma courts ought to be especially open to the idea of flexibility under the new statutory sanction power for a number of reasons. First, new section 995 constitutes a departure from the common law American rule which gave Oklahoma courts inherent power

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§ 15.1 (West 1988 & Supp. 1993) as interpreted by the Court. *TRW/REDA Pump Court*, 829 P.2d at 23-31.

305. FED. R. CIV. P. 11 (Committee Notes, 1993 Amendments). This concept is well known to the federal judiciary, *see* William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985), and has survived the substantial changes to the application of Rule 11 scheduled to go into effect on December 1, 1993 (The Rule retains the principle that attorneys and *pro se* litigants have an obligation to the court to refrain from conduct that frustrates the aim of Rule 1.).

306. For a federal case applying this notion at the appellate level, see, Granado v. Comm'r, 792 F.2d 91, 94-95 (7th Cir. 1986) (imposing sanctions for one nonfrivolous issue raised among several frivolous issues); *see also* White v. General Motors, 908 F.2d 669 (10th Cir. 1990) (declining to impose sanctions for one nonfrivolous issue among several frivolous ones, but leaving open possibility of future sanctions in such a situation). This notion of modulated sanctions is basic to the approach to the 1993 modifications to Rule 11 of the Federal Rules of Civil Procedure, *see* FED. R. CIV. P. 11 (Committee Notes, 1993 Amendments), and has been applied in this manner by the Tenth Circuit. *See* Dodd Ins. Serv. v. Royal Ins. Co. of Am., 935 F.2d 1152 (10th Cir. 1991) (noting complaint containing frivolous and non-frivolous claims can violate Rule 11 and sanctions should deter undesirable behavior).

307. The courts of other jurisdictions have begun to apply their sanctions statutes in this manner. *See, e.g.*, Imperial Palace v. Dawson, 715 P.2d 1318, 1321 (Nev. 1986) (noting court could award attorneys' fees, double costs and damages of two percent interest per month on all sums improperly withheld for unacceptable dilatory tactics on appeal).

to impose attorneys' fees in frivolous appeals or cases brought in bad faith, vexatiously, wantonly or for oppressive reasons.[308] It is also a departure from prior statutory sanctioning rules.[309] As such, the standards for assessing sanctions need no longer rest on (and be limited by) either basis for grounding the power of the court over sanctionable appeals. Further, statute-based power to sanction meritless appeals is not co-extensive with the bad faith or oppressive conduct exception to the American Rule.[310] Indeed, that would seem to be a fundamental teaching of *TRW/REDA Pump Co. v. Brewington*.[311]

The new statute is not, nor ought it be, burdened with the jurisprudence of the "meritless appeal" statute, as refined by cases such as *TRW/REDA Pump* (an appeal is either entirely without merit, and therefore frivolous, or it is not). For Oklahoma courts to rely on their fairly well developed common-law rules or rules interpreting current statutory authority for taxing costs in meritless appeals to limit the flexibility which lies at the heart of the new statute would render the new provision merely redundant. It follows, then, that under new section 995, frivolousness should not have to depend on a determination that the appeal was brought in bad faith or for the purpose of delay. Nor need the standard for determining whether an appeal is frivolous under new section 995 be limited to the standard for determining whether an appeal is "without merit" under section 15.1 of title 20. It is not unreasonable to conclude that an appeal can be "frivolous" and yet not be "without merit." For instance, an appeal can be characterized as frivolous if the briefing on appeal was incomprehensible or failed to comply with court rules.[312] But such an appeal may not be

308. *See, e.g.,* City Nat'l Bank and Trust Co. v. Owens, 565 P.2d 4 (Okla. 1977), and discussion, above at notes 225-229.

309. OKLA. STAT. tit. 20, § 15.1 (West 1988 & Supp. 1993), and discussion above at notes 222-223, 227, 231-234, 238-247, and 299.

310. TRW/REDA Pump v. Brewington, 829 P.2d 15, 23 n.5 (Okla. 1992) (construing OKLA. STAT. ANN. tit. 20, § 15.1 (West 1991)).

311. 829 P.2d 15, 22 (Okla. 1992); *see also City Nat'l Bank and Trust Co.*, 565 P.2d at 7-8. Thus, Oklahoma courts have insisted that the authority to sanction must be statutorily based, or grounded in the inherent power of the court. Since House Bill 1468 adds a new statutory basis for the imposition of sanctions, and one which does not track either the language of the common law exception to the American Rule, or that of the provision allowing the court to tax attorneys' fees for "meritless" appeals, it is possible for the court, without doing damage to its precedents, to significantly soften the standard under which frivolousness may be found, at least to the extent that the standard parallels that used by the federal courts. This concept has been recognized by the federal courts as well. *See, e.g.,* Autorama Corps. v. Stewart, 802 F.2d 1284, 1287-88 (10th Cir. 1986).

312. *See* Smith v. Eaton, 910 F.2d 1469, 1470, 1473 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991) (fining lawyer for almost totally incomprehensible brief); Tyler v. Hartford Ins. Group, 780 P.2d 755, 756-757 n.5 (Ore. 1989), *reh'g denied*, 784 P.2d 1102 (Ore. 1989) ("The

"without merit."[313]

Likewise, a finding of frivolousness need not result in limited sanction options for the court. The statute does not require the court to tax attorneys' fees as costs and nothing else, nor does it limit the power to sanction appellant and not counsel, or vice versa. Likewise, the court need not be limited to sanctioning only the absolutely most egregious cases in this uniform manner.[314] Rather, the standard which has been evolving in the federal courts, based on the modulated approach of FED. R. CIV. P. 11 and FED. R. APP. P. 38 sanctions, and in other states may (ought to) provide the basis for the frivolousness standard in Oklahoma, as well as the standard for assessing sanctions.[315] These sanctions can range from public reprimand, to monetary sanctions, to other sanctions tailored to suit the offense, coupled

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quantity of paper filed, coupled with the confusing and almost invariably nonsensical legal arguments in them, forced defendants to expend more time than the merits deserve.").

313. The Committee Comments to the Illinois frivolous appeal rule, modelled on Federal Rule 38 is instructive in this regard:

> However, this paragraph relates not only to frivolous appeals, i.e., those without merit and no chance of success, but also to appeals which are conducted in a frivolous manner, i.e., those whose primary purpose is to delay enforcement of the judgment, to cause a party to incur unnecessary expense, or which are generally prosecuted in bad faith. The determination that the appeal is frivolous or the conduct is improper is based on an objective standard of conduct, viz., an appeal will be found to be frivolous if a reasonable prudent attorney would not in good faith have brought such an appeal, or the appeal conduct will be found to be improper if a reasonable prudent attorney would not have engaged in such conduct. If an appeal is found to be frivolous, or the conduct improper, the subjective nature of the conduct is then important to determine the appropriate nature and amount of the sanction.

ILL. ANN. STAT. SUP. CT. RULES Art. III, Part F., Rule 375 (Smith-Hurd 1993).

314. The Committee Comments suggest that "[s]anctions may be appropriate where an appeal is filed solely for delay or for the purpose of disrupting proceedings in the trial court." *See* OKLA. STAT. ANN. tit. 12, § 995 Committee Comments (West Supp. 1993) at note 252 above. However, the Legislature did not intend by this language to limit the imposition of sanctions solely to appeals filed solely for delay or to disrupt proceedings, or to limit the flexibility of the courts in fashioning suitable sanctions for particular examples of frivolousness. Rather, the Committee Comments indicate that such appeals certainly ought to be sanctioned. Other types of conduct might also be sanctioned, *see, e.g.*, Goodyear Tire & Rubber Co. v. Pratt, 795 P.2d 115 (Okla. Ct. App. 1990) (awarding attorneys' fees for employer's challenge of substantially unreviewable finding of lower court); City Nat'l Bank & Trust Co. v. Owens, 565 P.2d 4 (Okla. 1977) (dismissing action after trial but before judgment). The only limitation reasonably intended by the statute on sanctioning power is that sanctions not chill the adversary process. *See* OKLA. STAT. ANN. tit. 12, § 995 Committee Comments (West Supp. 1993) at note 252 above. The Oklahoma courts have recently confirmed this rule, TRW/REDA Pump v. Brewington, 829 P.2d 15, 22 (Okla. 1992), and most other jurisdictions generally subscribe to it. *See, e.g.*, Price v. Price, 654 P.2d 46 (Ariz. App. 1982) (noting power to punish attorneys or litigants for prosecuting frivolous appeals should be used most sparingly); Mission Denver Co. v. Pierson, 674 P.2d 363 (Colo. 1984) (noting sanctions for frivolous appeals should be directed toward penalizing egregious conduct in clear cases without deterring lawyers from asserting their client's rights).

315. Thus, for instance, North Carolina has, by rule, specified a flexible approach to the determination of the amount or nature of sanctions in a particular case. *See* N.C.R. APP. PROC. Rule 34(b) (Michie 1992) (permitting courts to impose following sanctions: dismissal of appeal,

with nominal or compensatory damages in appropriate cases.[316] Furthermore, nothing in the rules precludes the courts from holding attorneys to the ethical and professional standards of the relevant rules of professional responsibility.[317]

But what of the policy against impeding the filing of meritorious appeals? If parties are free to seek sanctions in even the most nonegregious circumstances, then the effect may be the opposite of that intended. The situations in which sanctions can be imposed have increased and as a result the temptation to seek sanctions more often ought to increase as well. And the increase in the number of motions for sanctions may well increase the cost of filing or pursuing an appeal. But an increase in this type of satellite litigation need not invariably follow from the adoption of a modulated approach to appellate

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single or double costs, damages for delay, reasonable expenses, attorneys' fees, other sanction deemed just and proper). Several states permit their appellate courts to impose additional penalties upon a finding that an appeal was frivolous. *See, e.g.,* Burleson v. Jordan, 295 S.E..2d 335 (Ga. 1982) (penalty of 10% of the amount in dispute as additional cost); Property Management Serv., Inc. v. PMC Village Inn, Ltd., 754 P.2d 611 (Ore. 1988) (same). Other states have made the imposition of this type of penalty mandatory. Collins v. North Miss. Sav. & Loan Ass'n., 445 So. 2d 828, 831-32 (Miss. 1984) (15% mandatory penalty when appeal unsuccessful); Note, *Mandatory 10 Percent Penalty on Unsuccessful Appeal of Money Judgments in Alabama—Constitutional and Policy Considerations*, 32 ALA. L. REV. 197 (1980). *Cf.* Bankers' Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)(holding that such a penalty statute is constitutional), Burlington N. R.R. Co. v. Woods, 480 U.S. 1 (1987) (noting penalty provisions may be inapplicable in diversity cases).

316. William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201-204 (1985) (advocating the use of public reprimand of attorneys to be included in a published order or opinion). *See* Linda R. Hirshman, *Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 CHI.-KENT L. REV. 191, 204-06 (1987) (discussing increasing use of public scolding of counsel in addition to the assessment of monetary sanctions in the Seventh Circuit). Professor Hirshman notes that scoldings seem to occur most frequently in cases where the court feels the lawyer takes the law too far, or lend themselves to their clients' feuds, or commit breaches of etiquette. In that respect, see especially, *In re* TCI, Ltd., 769 F.2d 441, 447-48 (7th Cir. 1985). *See also* Mark S. Stein, *Of Impure Hearts and Empty Heads: A Hierarchy of Rule 11 Violations*, 31 SANTA CLARA L. REV. 393, 404-13 (1991) (discussing the incentives and disincentives to violate FED. R. CIV. P. 11 as a strategic decision). Broad ranging approaches to sanctions have been applied by the federal courts. *See, e.g.,* N.C.N.B. National Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1987) (assessing sanctions against appellants for filing frivolous appeal and additional sanctions against appellant's counsel for filing in brief appendix materials which court had struck); *In re* Bithony, 486 F.2d 319 (1st Cir. 1978) (suspending for six months and fining $500 attorney for filing appeals solely to delay deportation of clients). These broad ranging sanctions have been applied by courts of other states in disciplining attorneys prosecuting frivolous actions. *See* ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT 61:104-105 (1993) (and cases cited therein).

317. *See, e.g.,* McConnell v. Crithlow, 661 F.2d 116, 119 (9th Cir. 1981) (holding attorney to the standards prohibiting pursuit of frivolous claim in MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-109(A)(2) and D.R. 7-102(A)(2) and E.C. 7-5 (1979)). In a related vein, Victor Kramer has proposed that sanctions under FED. R. CIV. P. 11 be used primarily as a means of enforcing the Rules of Professional Responsibility and that their compensatory role be minimized. Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793 (1991).

sanctions under the new statute. First, as the commentary to the 1993 amendments to FED. R. CIV. P. 11 explain,[318] since the purpose of the sanctioning rule is to deter rather than just to compensate, many sanctions imposed will not be monetary. Censure, or referrals to educational seminars do not directly reward the moving party with a monetary award for his or her efforts.[319] Likewise, the requirement that any monetary sanctions be payable to the court as a penalty, rather than as damages to the complaining party, also substantially reduces the amount of economic benefit to a party otherwise tempted to seek sanctions. Moreover, the resort to sanctions to increase the cost of appellate litigation for appellant can be reduced by imposing an offsetting charge on an appellee tempted to play the sanctions game. This has been done. Thus, some jurisdictions impose sanctions on opposing counsel who file meritless motions for sanctions on appeal.[320]

But the approaches to minimizing this unintended and perverse effect of a modulated approach to sanctions might not succeed in eliminating all of the perverse effect of potentially broader sanctions. First, it ignores the grossly disproportionate effects of court discretion on plaintiffs, and public law claims.[321] This fusion of procedural and substantive goals has become unremarkable in the literature. Consider the substantive assumptions in statements such as the following:

318. *See* FED. R. CIV. P. 11 (Committee Notes, 1993 Amendments).

319. *See also* discussion in William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201-04 (1985).

320. *See* Partington v. Gedan, 880 F.2d 116, 131 (9th Cir. 1989) (awarding sanctions under FED. R. CIV. P. 11 against party filing a frivolous motion for FED. R. APP. P. 38 sanctions). *See generally* Alliance to End Repression v. Chicago, 899 F.2d 582, 583-84 (7th Cir. 1990); Nakash v. United States, 708 F. Supp. 1354 (S.D.N.Y. 1988); *Annual Judicial Conference of the Second Circuit*, 101 F.R.D. 161, 200 (1984); J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, SW. L.J. 677, 683 n.20 (1989). Such actions would be based either on power implicit in the new statute, or on the inherent power of the court. City National Bank and Trust Co. v. Owens, 565 P.2d 4 (Okla. 1977).

321. A recent Third Circuit study of the effect of the application of FED. R. CIV. P. 11 demonstrated that sanctions had a disproportionately adverse effect on plaintiffs, and especially on plaintiffs in civil rights cases. *See* RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 65-71 (1989). Other commentators have also recognized the effect of procedural rules on public law claims, and the failure of the rules to recognize the adverse impact of these facially neutral rules. *See, e.g.*, Carl Tobias, *Public Law Litigation, Public Interest Litigants and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989); Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J. L. REF. 425 (1986) (discussing impact on risk-averse of proposals to modify the fee shifting of FED. R. CIV. P. 68); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63-69 (1982) (discussing the disparate impact that changes on the economic incentives to settle have on litigants with different financial resources in the context of the settlement rules of FED. R. CIV. P. 68).

"[C]ircuit judges commonly complain that their dockets are clogged with routine, even frivolous appeals. Countless prisoner petitions, social security claims, and factual reviews they say, lack legal merit and warrant short shrift."[322] Any presumptions made by the courts that certain types of claims are meritless or that certain litigants bring meritless claims may substantially affect the way in which the courts exercise their discretion. Second, it may also ignore the effect of sanctions on the attorney/client relationship. An attorney who may be sanctioned for failing to uncover the duplicitous litigation conduct of a client may be less willing to subscribe to the traditional notion that lawyers owe their clients an absolute duty of loyalty.[323] The result is that the new rule would carry with it the potential for increased litigation costs to appellant including, but not limited to the cost of warding off marginal motions for appellate sanctions. To that extent, it might well chill some appeals. Though one may seek comfort in hoping that the appeals chilled would be the most marginal, it is as likely that the chilling would affect the marginally financed appeal as well. As such, the wholesale adoption of an aggressive federal approach might create an increased potential for chilling appeals, one which exceeds the tolerance of the Oklahoma courts. To the extent that the courts seriously entertain this fear, they might well adopt a "conservative" approach, sacrificing the policy of chilling frivolous appeals to encourage the filing of meritorious appeals.

But the Oklahoma courts would have to shift direction in order to arrive at a traditionalist approach to the new statute. That is the point of discussion in this section. To summarize: In *TRW/REDA Pump*, the Supreme Court clearly indicated both that statutory grants of sanctioning power are to be construed independently of the limitations of other grants of sanctioning authority,[324] and that federal case law interpreting the power of the federal courts to sanction frivolous appeals can be used as persuasive authority in construing Oklahoma

322. J. Woodford Howard, Jr., *Query: Are Heavy Caseloads Changing the Nature of Appellate Justice?* 66 JUDICATURE 57, 59 (1987). A close examination of the substantive nature of procedural rules is beyond the scope of this article.

323. *See* Business Guides v. Chromatic Communications Enter., 119 F.R.D. 685 (N.D. Cal. 1988), *aff'd* 121 F.R.D. 402 (N.D. Cal. 1988), *aff'd in part, rev'd in part, and vacated in part*, 892 F.2d 802 (9th Cir. 1989), *aff'd*, 111 S. Ct. 922 (1991). This implication of flexible approaches to sanctions is explored in Karen S. Beck, Note, *Rule 11 and Its Effect on Attorney/Client Relations*, 65 S. CAL. L. REV. 875 (1992).

324. For instance, the power to sanction frivolous appeals under the inherent common law power of the courts was held not to be coextensive with the power of the courts to award attorneys' fees as a sanction under OKLA. STAT. ANN. tit. 20, § 15.1 (West 1988 & Supp. 1993). *See* TRW/REDA Pump Co. v. Brewington, 829 P.2d 15, 23 (Okla. 1992).

law.[325] New OKLA. STAT. tit. 12, § 995 is different from OKLA. STAT. tit. 20, § 15.1 in at least two obvious respects. First, the new sanctions provision speaks of frivolous appeals. Existing law describes the appeals over which the statutory power to sanction extends as "meritless." It might follow that, to paraphrase the *TRW/REDA Pump* Court, the power to sanction frivolous appeals is not co-extensive with either the meritless appeals sanctions of existing law or the bad faith or oppressive conduct exception to the American Rule applied in Oklahoma. Second, the new provision does not set the sanctions which the court might impose. Since the court is not limited to awarding attorneys fees, and since federal law has begun to recognize the modulated approach of FED. R. CIV. P. 11 in assessing appellate sanctions, it is possible that the two statutory bases of imposing sanctions will be given differing effect, the new statute permitting the court to assess small penalties for less significant acts of frivolity in appeals and saving large sanctions for truly egregious cases.[326] Rather than characterizing an appeal as either meritless or not, or oppressive and vexatious or not, and imposing an unchanging sanction on that basis, the new sanctioning power permits a more refined approach, allowing the imposition of sanctions (on the basis of a sliding scale of severity) on appeals, some, but not all, of which may be frivolous as asserted or argued. Indeed, the cases considered in *TRW/REDA Pump* serve as good examples of the different results possible under the new sanctioning statute as compared to existing law.[327] As such, a restrictive

325. Indeed, the latest interpretation of OKLA. STAT. ANN. tit. 20, § 15.1 (West 1988 & Supp. 1993) makes clear that the federal rules for determining whether an appeal is frivolous can be used as persuasive authority in such cases. *TRW/REDA Pump,* 829 P.2d at 22-3.

326. Mullen v. Household Bank-Federal Savings Bank, 867 F.2d 586, 589 (10th Cir. 1989); Granado v. Comm'r, 792 F.2d 91, 94-95 (7th Cir. 1986) (awarding FED. R. CIV. P. 38 sanctions despite appellant's one non-frivolous argument because 22 of 24 pages of appellant's brief concerned frivolous arguments), and discussion above at Part I.C.2., *House Bill 1468 Changes.*

327. In that case, in the appeals which were found to be "meritless," the appellant sought review on theories not presented, sought a reweighing of the evidence both where the record below was devoid of evidence to support the claimed error and where there existed sufficient evidence to support the findings, and ignored well established law. There appeared to be no issue raised worthy of consideration. In contrast, in the appeals where frivolousness was not found, at least one of the issues raised was not frivolous (although others raised might well have been). This distinction makes sense when the only sanction is attorneys' fees on appeal. However, where the court has some discretion in setting the quantum of the sanctions, the court should be able to sanction a party who raises one or more frivolous contentions along with non-frivolous ones under the new statute. To the extent that the court's time is taken up by having to sift through the various contentions, the policy rationale remains the same; the court must still devote itself to the consideration of a frivolous contention. Clearly, a court does not desire to chill the filing of meritorious appeals; however, there is no reason it should be prevented from chilling the interposing of frivolous *issues* on appeal, even when those issues are presented along with non-frivolous ones. Under the new statute, the appeals which the court found not to merit

interpretation of the new sanctioning statute would be unfortunate and unnecessary, in effect gutting the statute of its possibilities and robbing the courts of the flexibility intended by the Legislature.

2. Consensus and the Additional Burden on Appeal

A strong argument, therefore, can be made that the addition of new section 995 to Oklahoma law is meant to provide the appellate courts with a substantial amount of flexibility in assessing sanctions in the face of frivolous appeals. It provides the courts with a third alternative ground for assessing sanctions for appeals the courts believe should not have been brought in the first place.[328] But as an analogue to the complexity which follows from the creation of action-specific adjustments to the costs of delaying the effectiveness of judgments, the flexibility possible from the new sanctions statute brings with it the probability of arbitrariness, or at least of unpredictability (confusion) in its application. That seems to be the lesson from the ten year old experiment in district court sanctions under FED. R. CIV. P. 11.[329] The diminution of predictability may be a high price to pay for flexibility, especially if one believes that predictability is necessary to maintain the perception that the adversary system is fundamentally fair.[330] The

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the imposition of sanctions in *TRW/REDA Pump* might still have been subject to some sanction, perhaps in an amount significantly less than that imposed on the more egregiously frivolous actions (where no issue raised was not frivolous). In both cases, frivolous appeals would be sanctioned, but under a more modulated approach to the new sanctions statute, the court might have imposed sanctions in all of the appeals, but in amounts corresponding to the magnitude of the offense. The federal courts have recognized the value of this approach. *See, e.g., Granado*, 792 F.2d at 94-5. (awarding FED. R. CIV. P. 38 sanctions despite appellant's one non-frivolous argument, because 22 of 24 pages of appellant's brief concerned frivolous arguments).

328. Since the appeal should not have been brought at all, the very act of bringing and prosecuting it, harms the other parties, primarily the other litigant who should have had full benefit of his judgment earlier and the court, whose personnel could have used the time to process other appeals. In this later sense, all other appeals suffer damage, since the frivolous appeal delays their final resolution. For a general discussion of these issues, see Ben F. Overton, *A Prescription for the Appellate Caseload Explosion*, 12 FLA. ST. U. L. REV. 206 (1984); Thomas B. Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43 (1982). A number of studies analyze the perceived effect of caseload congestion in state courts. *See, e.g.*, Julie M. Carpenter, *Appellate Delay as a Catalyst for Change in Virginia*, 23 U. RICH. L. REV. 141 (1988); Mark McCormick, *Appellate Congestion in Iowa: Dimensions and Remedies*, 25 DRAKE L. REV. 133 (1975); Laurence C. Harmon & Gregory A. Lang, *A Needs Analysis of an Intermediate Court*, 7 WM. MITCHELL L. REV. 51 (1981); Philip A. Talmadge, *Toward a Reduction of Washington Appellate Court Cases and More Effective Use of Appellate Court Resources*, 21 GONZ. L. REV. 21 (1985). *Cf.* RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985).

329. *See* William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015-16 (1988) ("In interpreting and applying Rule 11, the courts have become a veritable Tower of Babel."); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L.REV. 1925, 1941-42 (1989).

330. *See* Burbank, *supra* note 329, at 1942-43.

changes continue the new tradition of ignoring the impact of a discretion-based consensus on public law litigation, maintaining the sense of unfairness in the use of the rule for substantive effect.[331] But unpredictability has positive uses for litigants seeking manipulative tools to advance their substantive objectives. Unpredictability can price some litigants out of the law market.[332]

Thus, the core message of the potential for the imposition of additional sanctions may well be that litigation is not worth the risk.[333] As a consequence, attempts to obtain sanctions should increase.[334] It follows, then, that there should be a net increase in the cost of the risk of appeal, to the extent that the courts accept the statute's invitation to creatively craft both a flexible standard for the determination of frivolous appeal, and a scale of sanctions for the varying severity of frivolousness. To that extent, the incentive should be to decrease the number of marginal appeals. Additionally, it should also decrease the number of otherwise meritorious appeals where the appellant does not have the financial means to meet the added costs (risks) of appeal. Indeed, it is assumed that an aggressive approach to sanctions should increase the cost of pursuing an appeal, and perhaps reduce the flow of appeals.[335]

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331. For a discussion of the disparate impact of sanctions on public interest litigation see RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 67-69 (1989); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-201 (1988); Carl Tobias, *Public Law Litigation, Public Interest Litigants and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989).

332. This result is consonant with recent efforts by appellate courts to reduce their caseloads through the introduction of mandatory settlement conferences at some point prior to trial. *See* Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L. J. 755 (1986) ("CAMP reduces frivolous appeals while preserving the availability of appellate review. Staff Counsel often identifies weaknesses in the arguments of parties who bring meritless claims, and in such cases, the appellant not infrequently decides to withdraw the appeal."). Such settlement procedures have been recently instituted in Oklahoma. *See* Nancy K. Anderson, *Settlement Conferences Begin In Cases on Appeal*, 64 OKLA. B.J. 1991 (1993). For a critical assessment of alternative dispute resolution, see, Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991).

333. I paraphrase similar concerns noted in RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 44 (1989).

334. *See, e.g.*, Linda R. Hirshman, *Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 CHI.-KENT L. REV. 191, 199-208 (1987); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1958 (1989).

335. *See* Hirshman, *supra* note 334, at 206. Professor Hirshman argues that the aggressive approach to sanctions by the Seventh Circuit in recent years, by sanctioning as frivolous what is actually sloppy litigation, has had the effect of raising the standard of performance. Better performance in turn has increased the expense of appellate litigation in the Seventh Circuit, which should reduce the flow of business into the judicial system.

But consider the effect of the new sanctioning power if it is interpreted in a manner that adds redundancy, rather than flexibility, to the sanctions arsenal of the Oklahoma courts. After all, as I argued above, new section 995 neither sets a standard for what constitutes frivolousness, nor does it impose particular rules for determining the appropriateness of particular types of sanctions in particular cases. The new statute only amplifies what the Oklahoma appellate courts have been saying for years: if you interpose a meritless appeal, you will pay your opponent's legal fees (at least those generated by the appeal).[336] Even so, the mere presence of this additional provision should affect the risk (cost) of appealing, especially by those advancing marginal positions, and those who are financially marginal (irrespective of the bona fides of their positions).

Let's consider this more closely. The new statute will tend to chill appeals, even if the courts apply the new statute sparingly. Why? Because there are a greater number of cases now within the group of appeals which *might* be subject to sanctions on appeal. The odds of being in the "at-risk" group of appeals (those which could be determined to be frivolous *AND* merit sanctions of some kind) have increased. Even if the appellate courts substantially ignore the possibilities offered under the new source of authority to punish "frivolous" appeals and continue to apply its sanctioning power sparingly,[337] there will still exist an additional source of potential cost (increase) to the potential appellant, which will have to weighed against the value of appeal. Since litigants really never know in advance whether or not their appeal will be spared sanctions (except perhaps, in the most egregious cases), each marginal appeal bears a greater risk of incurring significant cost. Moreover, rational litigants must assume the possibility that the Supreme Court will use their appeal to express or review their approach to sanctions. Stated somewhat cynically, no one wants to be the appellant in a ground-breaking

336. *See, e.g.*, Hervey v. American Airlines, 720 P.2d 712, 713 (Okla. 1986) ("Just as taking a vacation carries with it the risk of encountering rainy weather, filing a frivolous and vexatious appeal carries with it the risk that the Supreme Court may impose attorney fees as costs.").

337. *But see* discussion, above at Part II.B.1., *The New Sanctioning Power, Traditional Sanctions Jurisprudence and the Effect of the Federal Rules* for an argument that, in fact as well as in theory, the new statute ought to result in the assessment of more sanctions for frivolousness, but the size of the sanction should become smaller on average. Indeed, several commentators have questioned whether, in fact, the emphasis on sanctions does not constitute a covert attempt to "lead litigants out of the courthouse." Hirshman, *supra* note 334, at 207 (describing Seventh Circuit's approach to appellate sanctions); Burbank, *supra* note 334, at 1947.

case like *TRW/REDA Pump*, and no one knows when the next ground-breaking case will be announced.

What results? Again, marginal appeals should decrease. However, at the same time, the additional sanctioning authority increases costs to the financially marginal litigant with a meritorious appeal. Consequently, along with the potential for decreasing "meritless" appeals (if only by the *in terrorem* effect of the existence of the new sanctioning authority), the new grant of sanctioning power may well also decrease the number of meritorious appeals prosecuted.[338] Therefore, as trial court judgments become more firmly final, they will increase in value whether or not correctly decided. Judgment winners, along with plaintiffs, may benefit most from this new rule—without regard to the merits of the judgment rendered. The lower courts also "win," at least to the extent that increased deference reduces any additional caseloads resulting from retrials of cases reversed on appeal. At the broadest level, parties unsuccessful at the trial court level, bear the heaviest costs of the new statutory scheme. On the bright side, it should be more costly to appeal merely for the purpose of delaying the inevitable.[339] Unfortunately, however, the resource-poor litigant on the losing side of a bad decision may find it harder to bear the cost of appeal, and it is not clear that our process of consensus building will respond to this contingency in any material way. Once again the message is that litigation (or appeal, in this case) is not worth the risk. At the practical level, the new sanctions statute may well increase the resources that litigants expend at the trial court stage; since the "value" of lower court determinations has increased (because of the potentially increased cost (risk) of appeal), any given dollar of litigation resources may have greater impact at the trial level than in post trial proceedings.[340] "Bad" law at the trial court level assumes a greater permanency, because appeals become less likely. To the extent one chooses to believe the rate of "bad" trial court law is low, this result should not be troubling.

338. On the *in terrorem* effect of the sanctioning power in the context of FED. R. CIV. P. 11, see Georgene Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 197-198 (1988).

339. This is true except to the extent that the additional costs of appeal still are less than the value of delay. As it becomes clearer that, in a large (and growing) number of cases, this is so, then, the consensus itself would have to shift further in favor of tighter controls on the ability to appeal.

340. Of course, I speak here of a nuance, and of resource allocation at the margin. Clearly, the enactment of OKLA. STAT. tit. 12, § 995 will not revolutionize the nature of jurisprudence in Oklahoma. But even subtle changes can have significant effect at the margin, and the potential for larger effect exists, especially if the appellate courts adopt a broad reading of their powers under the statute.

IV. Putting the Changes in Perspective

Appeal adds delay to the finality of judgments. Suspension adds delay to the effectiveness of judgments. Appeal as of right, coupled with the near certainty of little punishment for marginal appeals, when combined with automatic stays and stays as of right, creates an environment that fosters appeals, including marginal appeals.[341] As the costs of appealing a determination of the trial court decrease, the incentive to appeal the more marginal cases (since there is less to lose) increases. In the current climate, even if one is convinced that there is little chance of victory, it might even constitute malpractice to fail to appeal.[342] Consequently, perhaps, we begin to fear that meritorious appeals tend to get lost in the pile of marginal appeals. The number of appeals exceeds the optimum that ought to be prosecuted increases. Appellate court resources are spread thin as courts devote less and less time to consideration of individual cases. Alternatively, the time between appeal and decision grows and grows. All of this costs the state money—money to hire appellate personnel—not only judges, but also the administrative machinery needed to service the growing number of appeals. Both parties run the risk that appellate review will result in a determination equally erroneous.[343] Moreover, the costs of litigation, on both winners and losers is distorted (both increased and decreased) not by the bona fides of the proof of damages, but by the significant costs of the process itself.[344] Victorious plaintiffs may be induced to settle cases and defeated defendants may have to

341. And these are costs which may not be recoverable. *E.g.*, Allen v. Hartford Accident & Indemnity Co., 123 P.2d 252, 253 (Okla. 1942) (allowing no recovery against surety on supersedeas bond for damages suffered as a result of delay caused by unsuccessful appeal in recovery of judgment in the absence of specific provision therefor in the bond instrument).

342. *See, e.g.*, Burbank, *supra* note 334, at 1958 (noting the same tendency in connection with sanctions motions under Fed. R. Civ. P. 11).

343. Thus, some commentators have noted that a problem with free review is that it may not reduce the systemic deficiencies of dispute resolution, of which faulty judging is merely symptomatic. Thus, "the problems of inconsistency, irrationality, and bias may only be moved from the first to the second tier, and possibly from individuals of lower social classes to those of higher status." Resnick, *supra* note 12, at 866. *But see* Richard Posner, The Federal Courts: Crisis and Reform (1985) (discussing problems of free appeal).

344. These internalized costs have provided a significant spur to the settlement and dispute resolution movements. *See, e.g.*, Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 429 (1986); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L.Rev. 754, 789-93 (1984); Peter H. Schuck, *The Role of the Judge in Settling Complex Cases: The Agent Orange Example*, 53 U. Chi. L. Rev. 337 (1986) (discussing positive costs associated with judicial settlement).

abandon appeals, because of the financially coercive nature of the appellate process.[345]

Appellate procedural rules, and specifically those determining finality and effectiveness of judgments, then, are not abstractions. It follows that the manipulation of these rules does not have a neutral effect on litigants. Rather, procedural rules affecting finality and effectiveness are an expression of a societal consensus, which shifts over time, respecting the "importance and difficulty of passing judgments on individual's conduct, and of the place of government in citizen's lives."[346] The current consensus evidences a substantial general discomfort with the finality of lower court determinations,[347] but also an unwillingness to substantially repudiate such lower court determinations in a variety of contexts.[348] As a result, a number of alternatives to the current model of appellate decision-making are not taken seriously.[349]

Consider, in this context, the currently problematical notion that

345. Indeed, in this sense, appellate procedural rules may perform the same coercive function as settlement pressure before trial. *See* Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076-78 (1984). Appellate procedure, to the extent it increases the cost of victory or that of defeat, acts much like the aggressive federal trial court judge pushing for settlement using his manipulative authority under FED. R. CIV. PROC. 16. *See, e.g.*, SCHUCK, *supra* note 344, at 150-166 (describing judge's aggressive settlement promotion in Agent Orange case). *But see* Richard L. Marcus, *Apocalypse Now*, 85 MICH. L. REV. 1267, 1292-95 (1987) (reviewing PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986)); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 402 n.115 (1982).

346. Resnick, *supra* note 12, at 840. (describing values reflected in crafting of procedural rules and how their interaction shapes such rules).

347. Professor Dalton discusses the negative implications of this consensus, including growing disrespect and disregard of lower court determinations. Harlon Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985).

348. Thus, for instance, appellate courts tend to resist review of evidentiary conclusions of the lower court, for example, see TRW/REDA Pump v. Brewington, 829 P.2d 15, 25 (Okla. 1992), as well as determinations with respect to which the lower court did not have a chance to rule, see *id.* at 24. But compare the *de novo* review standard of federal magistrate's decisions by federal district judges pursuant to 28 U.S.C. § 636(b)(1)(C) (1988 & Supp. 1993) (limited deference), or in some state courts. *See* Justices of the Boston Mun. Court v. Lydon, 104 S. Ct. 1805, 1808 (1984) (determination in first action not communicated to second judge); Resnick, *supra* note 12, at 866-867.

349. Professor Resnick has identified six (6) different models of judicial decision-making and review: (i) The single judge/finality model, (ii) the single judge plus same judge model, (iii) the single judge plus limited review model, (iv) the single judge plus unlimited review model, (v) the single judge plus limited review plus limited review model, and (vi) the single judge/different forum plus unlimited review model. Resnick, *supra* note 12, at 860-70. Many states, including Oklahoma, and the federal system, are based on the single judge plus limited review plus limited review model, though others are still based on the single judge plus limited review model. "This model offers litigants more occasions to persuade state officials and increases the opportunities for revisionism." *Id.* at 868. Professor Resnick has also recognized the costs of this model: The costs of maintaining the judicial apparatus are high compared to systems of more limited review. The victors in the proceedings below are forced to participate in additional rounds of dispute resolution, and the losers below may not have the resources or experience to proceed onto the

all trial court determinations ought to be confirmed by appellate review before such judgments become effective and enforceable. Note, however, that our model of appellate procedure contains substantial elements consistent with this notion. Thus, it may not be all that farfetched to envision a system in which appellate review is automatic, eliminating entirely the machinery of appeal, and the traps (and costs) it creates for unwary litigants. Such a regime might require automatic stay of all judgments, since all judgments will be appealed. Such suspension would be effected with or without the posting of a bond because a bond doesn't matter much if the notion is that judgments lack merit unless passed on in an appellate proceeding).[350]

For the same reason, it is difficult to consider the notion that in the ideal world judgments of the trial court are more often than not fair and just, as we prefer to understand these terms.[351] Embracing this notion would make barriers to finality and effectiveness more difficult to erect than is currently possible to do. Such a system would treat suspensions of judgment as a form of extraordinary relief, and all appeals would be presumed frivolous, absent compelling proof to the contrary. Finality would be greatly strengthened, and the value of an award would approach the amount actually awarded.[352] Of course, under such a regime, a shift in consensus regarding the rate of erroneous trial court decisions might create significant incentives for litigants to adjust their conduct accordingly. In a context where appeal is difficult, the stronger the consensus that judicial decision making tends to

next rung. Lastly, delay may impose significant costs not only to the litigants, but to society. *Id.* at 869.

350. In a system of mandatory appeal, the trial court's role is insignificant. Arguments are made and evidence is presented primarily for the benefit of the reviewing court, the trial court reduced to a court of dress rehearsal. Since finality and effectiveness both await the determination of the reviewing court, the time between the initiation and the resolution of lawsuits will grow, and with it the cost of obtaining resolution. Perhaps, this would not be a bad thing for those who desire reducing court caseloads. But this regime increases the cost of defense as well. While those who require quicker resolution might be affected adversely, those with little to lose might be encouraged to sue for the settlement value of the suit. Worthy impecunious defendants would tend to be adversely affected by the mere operation of the system itself.

351. Compare the German system of dispute resolution where judges, rather than lawyers, investigate the facts. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824, 833-48 (1985).

352. Under a regime of severely limited appeals, trial court determinations assume a greater significance than they have under the present regime. Moreover, to the extent that our appellate rules approach a situation where all losers on appeal will have to bear additional costs (as sanctions, or however else denominated), the additional risk of appeals may be high enough, perhaps, to deter the interposing of a significant number of otherwise well taken appeals. The same effect would be obtained by severely limiting the ability to suspend the effectiveness of judgments.

be erroneous the more likely are litigants to resort increasingly to alternative methods of dispute resolution rather than risk being on the short end of an erroneous decision.[353] In addition, our system of appellate procedure contains elements consistent with this view as well, limiting appellate review of many aspects of the proceedings below.

But we recoil from either extreme. We are comfortable constructing systems which are neither fish nor fowl, and in characterizing non-conforming approaches as "extreme." But why "extreme"? Precisely because each extreme acutely deviates from the ideal standard of the system of dispute resolution, the "adversarial system," we have adopted.[354] This adversarial system, in idealized form, requires the existence of adversaries—plaintiffs and defendants, winners and losers—locked in "combat," presenting cases to an ideally neutral and relatively passive judicial machinery. Civil procedure provides a formalized vehicle through which substantive contests are played out. And the civil process is concerned, in non-criminal matters at least, with the resolution of conflicts of interests as between the disputants, in which the attainment of "scientific" truth is largely irrelevant, but in which a consensus of "fair" result more often than not becomes paramount.[355]

However, the judicial machinery required by this system is one which now balances the need to fully consider each case against the reality of a large and unending stream of such cases.[356] Moreover, the

353. Indeed, Professor Resnick argues that many procedural innovations over the last two hundred years have resulted in a substantial movement away from a system of extreme finality of trial court determination. *See* Resnick, *supra* note 12, at 861.

354. For a discussion of the nature of the adversarial system, from which arise the critical assumptions shaping our notions of jurisprudence, see LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE 706-07 (1949). Fuller lists among the critical assumptions of this system of dispute resolution:

> 1) The judge does not act on his own initiative, but on the application of one or more of the disputants. 2) The judge has no direct or indirect interest (even emotional) in the outcome of the case. 3) The judge confines his decision to the controversy before him and attempts no regulation of the parties' relations going beyond that controversy. 4) The case presented to the judge involves an existing controversy, and not merely the prospect of some future disagreement. 5) The judge decides the case solely on the basis of the evidence and arguments presented to him by the parties. 6) Each disputant is given ample opportunity to present his case.

Id. at 706. For a critical view of the adversarial system in light of the German model of litigation, see Langbein, *supra* note 351. *But see* Judith Resnick, *Managerial Judges*, 96 HARV. L.REV. 374, 386 (1982) ("Ironically [the] description of the German judge . . . now seems apt for the American judge as well.").

355. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 544 (1978) ("Our own research on this topic has shown that persons whose interests are in direct conflict place no value on the attainment of 'truth,' and, indeed, truth is not for them a salient or relevant consideration.").

356. For a discussion of the evolution of the judicial function from that of passive decision

adversarial model also requires, at least in ideal form, rational disputants, equality of resources, and counsel of roughly equal abilities.[357] As reality departs from these assumptions, facially neutral procedural rules can be used to substantive effect.[358]

Since rules can be skewed to favor the substantive position of one side or the other, the actors affected by these rules are always skirmishing among themselves respecting the scope, coverage and application of the rules, seeking advantage for their position not only in the evidence, but in the rules of the contest between them. The language of these debates is "fairness"—or rather the perception of fairness, because it is the perception (not the "reality" of fairness, the existence of which might well be highly debateable) that drives shifts in procedural rules for the purpose of imposing greater or lesser costs on one or the other litigant.[359] Indeed, as the recent debates over a related procedural device, trial court sanctions under the Federal Rules of Civil Procedure, amply demonstrate, procedural rules have become far more self-consciously used as vehicles for both substantive law reform on a global scale (that is, the notion that potential litigants are too eager to press claims of violation of legal obligations by others and procedural rules can impair their ability to readily bring claims in defense of such rights) and at the level of the individual case (that is, the

makers to managers and facilitators of cases, and the implications of this evolution, both good and bad, see Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 414-431 (1982); Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983 (1989). After the 1983 amendments to FED. R. CIV. P. 16, "[j]udges began to see themselves less as neutral adjudicators—deciding what the parties brought to them for decision and proceeding at a pace to be determined by the parties " and more as managers of a costly and complicated process." *Id.* Professor Resnick argues that the success of the new role, decreasing delay, reducing costs and increasing the number of case dispositions, has come at the price of eroding traditional due process safeguards by vesting judges with greatly enhanced power over cases, and threatening their ability to impartially judge. For a critical view of Professor Resnick's argument, see Steven Flanders, *Blind Umpires—A Response to Professor Resnick*, 35 HASTINGS L.J. 505 (1984) (arguing judicial case management not inconsistent with due process).

357. Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 513 (1986). ("With the two sides of a dispute more or less evenly matched, then, at least in theory, the contest permits the 'correct' winner to emerge.").

358. From these departures from the ideal spring criticisms from traditionalist and non-traditionalist commentators decrying their perception of the courts' increasing abuse of its discretionary power for substantive effect. *See, e.g.*, JOEL HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1986); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265; Richard L. Abel, *Informalism: A Tactical Equivalent to Law*, 19 CLEARINGHOUSE REV. 375 (1985).

359. *See* Laurens Walker et al., *The Relation Between Procedural And Distributive Justice*, 65 VA. L. REV. 1401, 1415-20 (1979); *cf.* Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

notion of promoting judicial management as a means to alter substantive outcomes by shifting litigation costs on a case by case basis).[360] But the commentators concentrate on the incentives of the courts to manipulate the substantive potential of procedural rules, either to limit the right of litigants to protect their substantive rights in court or to reduce dependence on traditional trials for the vindication of such rights.[361] Equally important to consider, however, are the incentives of the litigants themselves to indulge in the penchant for manipulation and the use of discretionary authority and procedural rules for substantive gain. The effect of the manipulation of the rules can be striking.[362]

The adversarial model of litigation promotes systems of procedure, including appellate procedure, that at best are temporary compromises, treaties, or points of equilibrium, in the contest between winners, losers and decisionmakers as each seeks to use seemingly impartial rules to advantage.[363] Thus, litigants and their counsel do not confine the advancing of their cases to the aggressive presentation of evidence and law in support of their position; they seek, on a systemic level, to manipulate the underlying rules by which cases are made and defended for substantive effect. This goes beyond the substantive effect of a victory, for instance, on statute of limitations grounds. It involves the use of procedure to reduce the value of judgments actually awarded, or to avoid them in substantial respect. The courts seek

360. *See* Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Stephen Burbank has correctly noted that:

> [S]trategies have dominated recent efforts of the rulemakers and debate. . . literature. One is to enhance the power of trial judges to manage litigation. (footnote omitted) Another is to enhance incentives for people to avoid litigation. (footnote omitted) Both represent steps in the flight from law.

Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716 (1988).

361. *See, e.g.*, Carl Tobias, *Public Law Litigation, Public Interest Litigants and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989); Burbank, *supra* note 329, at 1955-62; Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); J. Woodford Howard, Jr., *Query: Are Heavy Caseloads Changing the Nature of Appellate Justice?* 66 JUDICATURE 57 (1987).

362. Thus, FED. R. CIV. P. 11 can be seen as a means of distorting the ability of plaintiffs to obtain relief in particular areas, notably civil rights cases. Georgene Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-201 (1988) (including civil rights and employment discrimination suits as disfavored actions). *See* Burbank, *supra* note 329, at 1937-38; Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988/89); Abel, *supra* note 358.

363. Walter V. Schaefer, *Is the Adversary System Working in Optimal Fashion*, 70 F.R.D. 159, 176 (1976) (paper presented at the National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice) ("Like our doctrines of substantive law, our procedural rules are molded by the impact of the situations presented to the courts . . . and our procedural rules like our substantive rules must be remolded in response to the impact of those forces.").

to employ the rules as well, favoring creation of a system of procedure that does not result in duplication, that speeds the processing of cases, and that accords more finality to the determinations of lower courts and also perhaps, that limits the availability of the courts to potential litigants.[364]

Adherence to the basic controlling assumptions of the adversarial ideal also precludes serious consideration of alternatives to the almost rhythmic fluctuation of notions regarding the finality of trial court judgments. Alternative dispute resolution—negotiation, mediation, arbitration—is kept at the margins, never seriously considered, except as a necessary expedient, a poor cousin, whom we must entertain because we don't have the resources to provide true, full justice to all litigants.[365] Less drastic alternatives are also shunted aside, perhaps more thoughtlessly than they ought to be. This is the fate of our approach to civil appellate procedure. Consider, for instance, a concept of dispute resolution that required the state to pay litigants for damages suffered as a result of erroneous determinations either at the trial court or intermediate appellate level.[366] After all, it can be argued, that the error ought to be borne by the entity responsible. However, our critical model of dispute resolution assumes that litigants bear all the costs (and risks) of the dispute and its resolution, including the risk that the dispute resolution machinery is not working at its best in a particular case. A concept such as this would be characterized as ludicrous, even if it substantially reduced the cost of obtaining a just

364. Burbank, *Of Rules and Discretion*, *supra* note 360, at 716. The need to retry a case reversed on appeal is quite burdensome on a court attempting to deal with a clogged calendar. Moreover, the ability to narrow the range of cases that may be appealed invariably strengthens the finality of lower court determinations. Appeals as of right reduce the weight of finality to lower court determinations. The process of an increasingly selective certiorari process strengthens such finality, even in the face of patently erroneous lower court determinations. Thus, in Oklahoma, the certiorari power of the Supreme Court, and its determination that mere error on the part of lower courts is insufficient to warrant review, see OKLA. STAT. ANN. tit. 12, ch. 15, App. 3, Rule 3.13 (Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court) (West 1988 & Supp. 1993), effectively reduces the case load of the reviewing court while it increases the finality of even erroneous decisions. The appellate courts, in this manner, are able to shift more of the risk of erroneous determination to the litigants. *Cf.*, E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L.REV. 306, 322-41 (1986) (arguing that the essence of managerial judging "is ad hoc action by judges to impose costs on lawyers.").

365. *See, e.g.*, Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676-79 (1986); Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 19-24 (1987); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991).

366. This concept could even be coupled with a requirement that the appellant pay all of the costs of the appeal, including all attorneys fees and costs irrespective of the merits of the appeal.

result.[367] But, for good or ill, our legal system is not designed to conceptualize problems or solutions in this manner. Ironically, in the guise of a purely procedural device meant to encourage settlement, the substance of such a notion can be readily accepted.[368]

And so the wrestling with finality and effectiveness of judgments continues. House Bill 1468 represents the completion of another iteration, another point of rest, in the evolution of a new consensus regarding the manner in which costs can be imposed on opposing litigants. The changes are not revolutionary; they do not evidence a strong turn in the consensus in any direction. Rather they demonstrate a tendency to modify at a secondary level, based on a determination of the utility of appellate review, even as the general outline of consensus remains substantially unmodified. However, adopting a longer term perspective, the changes may well also evidence the continuing movement of consensus from one motivated by the desire to use procedural rules to foster decisions on the merits, to one motivated by the desire to use procedural rules to limit the availability of the courts to potential litigants.[369]

In this respect, the changes brought by House Bill 1468 add to the substantial effect of the weight of changes which have been creeping through procedural rules for a number of years. In particular, they

367. For similar reasons, a slightly more modest concept, that the state eliminate entirely the concept of suspending the effectiveness of judgments, but that the state (or the judgment winner) fully compensate the judgment loser for all costs (damages suffered) in the event that the trail court judgment is overturned on appeal would seem alien. For those who find something wrong with the notion that a judgment winner must bear the cost of a review of a lower court determination, and, win or lose, suffer a decrease in the value of his judgment, such a concept, might have more merit.

368. FED. R. CIV. P. 68 provides a good example. It imposes cost (and potentially attorneys fee) shifting in the event a pre-trial offer of settlement is greater than the amount actually recovered by a plaintiff after trial. *See* Marek v. Chesny, 473 U.S. 1 (1985). But the cost and potential fee shifting effect of FED. R. CIV. P. 68 can have a disproportionately negative effect on the availability of substantive rights to the risk averse. *See* Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J. L. REF. 425, 439 (1986); Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 531-32, 534 (1986).

369. *See generally,* RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985); Burbank, *supra* note 329, at 1944 (describing an emerging consensus of "faith in the need for lawyers and clients to exercise some restraint in the consumption of resources, private and public, and in the need for federal trial judges to help them do so"); Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 497-98 (1986) (arguing discussions of functions of Federal Rules of Civil Procedure have changed substantially over last fifty years). Professor Resnick notes that:

> "Whether the cry is for more therapeutic methods of dispute resolution or for managerial judges to control wayward attorneys and to stabilize a malfunctioning process, the requests are often the same: limit opportunities for adjudication by judges and for trial by jury and offer different mechanisms for the disposition of disputes."

Id.

affect the appealability of certain causes of action more than others, and they affect different causes of action in different ways. They evidence a revised distribution of procedural advantage which can be gained (in terms of money, and time) by manipulating the rules of appellate procedure. And procedural advantage now more forcefully favors a greater final effect for trial court determinations. The enactment of the new frivolous appeals rules strengthens the hand of the courts. The *in terrorem* effect of the rules may reduce, for practical purposes, the availability of appeal as of right, where counsel is unable to second guess an appellate panel on the weightiness of the appeal. The Oklahoma courts are encouraging counsel to think in these terms.[370] However, there may be a pernicious side to this as well, an effect which has lurked just beneath the discussion throughout this article " shifting costs, and the possibility of punishment, especially for the vindication of politically unpopular rights, may effectively reduce the availability of certain rights to potential litigants.[371]

The costs to judgment winners, in the aggregate, is also reduced to the extent that, on average, the probability of an appeal decreases. Since the finality of lower court determinations has been enhanced, lower courts have received an additional advantage as well. Litigants will have more to lose at the lower court than in a system of freer (or cheaper) appeals and should tend to concentrate more resources at that level. Moreover, to the extent that appeals decrease, the work of the lower courts should decrease as well (at least with respect to the cost of processing appealed cases). Retrials may also decrease (at least, that would be the hope where the consensus favors more deference to the determinations of the trial court). In close cases, or where judicial impartiality may be questioned (at least where it may be evidenced by a pattern of abusive evidentiary and procedural determinations), the threat of reversal-inducing self-correction is diminished.[372]

370. Thus, the warning of the Oklahoma Supreme Court: "The decision to appeal should not and cannot be made as a knee jerk reaction simply because a party lost in the lower court. More is required to make the decision to appeal." TRW/REDA Pump v. Brewington, 829 P.2d 15, 29, n.16 (Okla. 1992).

371. As mentioned earlier in related contexts, foremost among these might be civil rights claims. *See* FED. R. CIV. P. 11. RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 69-72 (1989). The courts have also expressed this concern on occasion. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 392-93 (1990).

372. *But see* Harlon Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 92-3 (1985). Professor Dalton states:

> Even if appeal of right does promote self-correction by trial judges, any consequent gain in accuracy may be more than offset by harm done to the trial court as an institution. The more we underscore the fact that trial courts are hierarchically inferior to

There is more risk now to obtaining a stay in a greater variety of proceedings. Discretionary stays can potentially increase the cost of suspension (and therefore the value of appeal), as judges are exposed (successfully) to arguments seeking the imposition of the most onerous set of conditions the judgment winner can persuade the court to adopt. Potentially, this can preclude pursuing review of the trial court determination. On the other hand, the judgment debtor in money judgment proceedings may well have an easier time of it; one "easy" payment may serve to suspend the effectiveness of a judgment and discharge the lien of judgment as well. To the extent that an adverse judgment can be taken care of in this way, monied judgment losers have a substantially greater incentive to appeal. As a result, judgment winners in money judgment cases will suffer a substantially greater potential diminution in the value of their award, and have a greater incentive to settle on appeal. Additionally, the Appellate courts are making settlements on appeal easier.[373] Additional sanctions powers raise the potential for adverse disproportionate effects on plaintiffs and also reduce the value of litigation to that group. To the extent that an anti-plaintiff bias (or, for that matter, any other discretionary bias) becomes both apparent and common knowledge among a local bar, it inevitably becomes another variable to be factored in the calculus of suit, or the determination to appeal and therefore vindicate rights. As a result, the signals sent by the rules changes are complex, and diverse. The only clear shift, though, seems to be in a continuing expansion of the power of the courts to use procedural rules to effect substantive decisions in the name of efficiency, fairness and docket control.

So we continue to express concern about consensus. We balance the risks of winning and losing, of preventing judgment winners from actually collecting their award, or increasing the costs of doing so, against protecting litigants from errors in the resolution of a dispute, and preserving the value of the relief accorded a judgment winner

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appellate courts, the more we feed the notion that they are inferior in other ways as well.

This view is subject to vigorous dispute. *See* Paul Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 So. Car. L. Rev. 411, 431 (1987).

373. *See* Okla. Stat. tit. 12, ch. 15, App. 2, Rule 1.14A (Supp. 1992) (establishing voluntary and confidential settlement conference program for cases on appeal). For a discussion of the program, see Nancy K. Anderson, *Settlement Conferences Begin In Cases on Appeal*, 64 Okla. B.J. 1991 (1993).

from collateral attack through the aggressive use of the appellate process. Consensus is a good thing, to the extent it reflects current, generally held assumptions of acceptable risks and costs in the appellate aspects of the adversary process. It increases the litigant's perception of the fairness of the process as well as the result.[374] However, it is also a temporary understanding, subject to criticism and change as litigants, and those paid to serve them, come to a different understanding of what constitutes an acceptable balancing of costs and benefits to judgment winners and losers in the process of appellate litigation. And it is a consensus reflecting the power of some groups and the relative powerlessness of others to affect the debate on procedural rules. Even as the new Oklahoma rules reflect an agreement about costs of appeal, the utility of review, and the value of substantive rights in private litigation, consensus remains elusive in the area of public interest litigation.

Oklahoma courts have suggested that "the decision to appeal a case must be made on an individual case-by-case basis depending on the special facts and applicable law."[375] But litigants have an incentive to appeal precisely because they lost. The decision to appeal is not merely a function of the weighing of the merits. It is also a function of the value or cost of using the *process* of appeal to substantially affect the value of a claim. Consensus balances the danger of permitting bad trial court decisions to stand against that of permitting good trial court decisions to be diminished by unregulated appellate rights. The balance currently favors the trial courts. It is strengthened by the perception that too many "marginal" cases are being asserted in the first place. The danger of consensus-making which does not disturb the manipulative potential of the procedural rules themselves is that consensus will remain elusive. Oklahoma's travails in this regard provide strong evidence of this. Perhaps of more significance is the danger of the loss of the consensus makers' grounding in the principles from which it derived its legitimacy. In particular, the principle of equality of treatment can be lost in the flight toward greater judicial discretion and an emphasis on case management. And with the loss of

374. *See* Laurens Walker et al., *The Relation Between Procedural And Distributive Justice*, 65 VA. L. REV. 1401, 1415-20 (1979); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 551 (1978). "The procedural model best suited to the attainment of distributive justice in disputes entailing high conflict of interest is . . . the Anglo-American adversary model." Thibaut & Walker, *supra*, at 551. But this conclusion rests on the assumption that the parties seek "justice" not "truth" and that the disputants are of equal strength and ability. *Id.* at 552-54.

375. TRW/REDA Pump v. Brewington, 829 P.2d 15, 29 n.16 (Okla. 1992).

the perception of equality of treatment may come the loss of any ability to reach consensus at all.